

No. 11917

United States
Circuit Court of Appeals
For the Ninth Circuit.

GEORGE H. RICHARDSON,
Appellant,
vs.

THE TRAVELERS INSURANCE COMPANY,
Appellee.

Transcript of Record

Upon Appeals from the District Court of the United States
for the Northern District of California,
Southern Division

FILED

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PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court, in and for
the Northern District of California, Southern
Division

No.....

THE TRAVELERS INSURANCE COMPANY,
Plaintiff,

vs.

GEORGE H. RICHARDSON,
Defendant.

COMPLAINT FOR REFORMATION OF
INSURANCE POLICY

Plaintiff complains of defendant and for cause
of action alleges as follows:

I.

That at all times herein mentioned plaintiff has
been and now is a corporation duly organized and
existing under and by virtue of the laws of the
State of Connecticut, and duly authorized to trans-
act the business of life insurance in the State of
California; that plaintiff is a citizen of the State
of Connecticut; that defendant is a citizen of the
State of California; that the matter in contro-
versy exceeds, exclusive of interest and costs, the
sum of \$3,000.00.

II.

That heretofore, to wit, on the 13th day of De-
cember, 1926, defendant applied to plaintiff that
there be issued to defendant an insurance annuity

in the amount of \$10,000.00 on the uniform [1*] premium plan; that a copy of said application is attached hereto, marked Exhibit "A," and made a part hereof.

III.

That thereafter and on the 3rd day of January, 1927, pursuant to said application, plaintiff made, issued, executed and delivered to defendant its certain policy of insurance, a copy of which is attached hereto, marked Exhibit "B," and made a part hereof.

IV.

That by mutual mistake said policy of insurance so issued to defendant was not the policy of insurance applied for by defendant, nor the policy intended to be issued by plaintiff.

V.

That a copy of the policy of insurance applied for by the defendant is attached hereto, marked Exhibit "C," and made a part hereof.

VI.

That plaintiff does not keep any copies of policies issued by it to its assureds and did not keep any copies of the policy issued by it to defendant, and nothing in plaintiff's records would disclose the mistake in furnishing the wrong policy form to defendant; that plaintiff's first knowledge of said mistake was in the month of March, 1946, when

*Page numbering appearing at foot of page of original certified Transcript of Record.

said policy of insurance became the subject of discussion between plaintiff and the assignee of said policy of insurance, The Crocker First National Bank of San Francisco.

As and for a separate and distinct cause of action, plaintiff complains of defendant and alleges as follows:

I.

Special reference is hereby made to the allegations of paragraphs I, II, III, V and VI of the first cause of action hereinabove set forth and by this reference each and all of the allegations thereof are incorporated in and made a part of this second cause of action [2] with like force and effect as if fully set forth herein.

II.

That by mistake of plaintiff which defendant at the time knew or suspected, said policy of insurance so issued did not truly express the intention of the parties thereto in this that said policy was not the policy of insurance applied for by defendant, nor the policy intended to be issued by plaintiff.

Wherefore, plaintiff demands judgment that said policy of insurance so issued to defendant be reformed and corrected so as to state and provide in the Special Privileges Section thereof for each \$1,000.00 of insurance that the second option upon surrender of the policy the insured may receive a cash payment of \$395.00 and a paid up contract, payable at death, for \$1,000.00 in lieu of a cash

payment of \$739.00 and a paid up contract, payable at death, for each \$500.00 of insurance; and that defendant surrender and deliver the said policy of insurance to the plaintiff so that the same may be written and corrected accordingly, and for such other and further relief as to the Court may seem meet and proper in the premises.

JOSEPH T. O'CONNOR,
HAROLD H. COHN,
Attorneys for Plaintiff. [3]

EXHIBIT "A"

The Travelers Insurance Company
Hartford, Connecticut

The Undersigned (Insured, Beneficiary and Assignee if any) hereby request that in lieu of Contract No. 373735 - 482573 upon the life of George H. Richardson there be issued a new contract as follows:

1. Amount, \$10,000.00; Form Ins. Annuity Age 65 on the Uniform Premium Plan with No A Disability Provision
2. A. Premiums Payable annually.
B. Date of Birth: Month, Aug.; Day, 21; Year, 1881
C. Date of Policy: 9-27-16
D. Ratable age: 35
3. Beneficiary: Alice L. Richardson, Wife
4. Special instructions: Contingent Beneficiary: Wendell L. Richardson, son, and Mary L. Richardson, daughter, equal shares, or in case of their death to their children, if any, in equal shares.

In consideration of issue of the new contract and effective upon delivery thereof, the aforesaid original contract is hereby released and surrendered to The Travelers Insurance Company, Hartford, Connecticut, together with all right, title, claim, interest and benefit which the Undersigned have or may have thereunder; and the undersigned do hereby certify and declare that no person, firm or corporation other than those joining in this release have any interest or right therein or any title, legal or equitable, in whole or in part thereto.

/s/ GEORGE H. RICHARDSON,
 Insured,
 -----,
 Beneficiary,
 -----,
 Assignee.

Dated at San Francisco, Calif., December 13, 1926. [4]

District Court of the United States for the Northern
District of California, Southern Division

No. 26322-S

THE TRAVELERS INSURANCE COMPANY,
Plaintiff,

vs.

GEORGE H. RICHARDSON,
Defendant.

ANSWER AND COUNTERCLAIM

Comes now the defendant George H. Richardson and in answer to plaintiff's complaint admits, denies and alleges as follows:

I.

Admits the allegations of Paragraph I of said complaint.

II.

Except as herein otherwise admitted, denies the allegations of Paragraph II of said complaint but alleges that on September 27th, 1916, the plaintiff sold defendant its life insurance policy No. 373,735 in the amount of \$15,000, which policy provided for annual premiums in the amount of \$309.75.

That on December 13, 1918, the plaintiff also sold defendant its life insurance policy No. 482573 in the amount of \$10,000.

That on or about December 13, 1926, the plaintiff prevailed [8] upon defendant to convert said above numbered policies, aggregating \$25,000 of life in-

surance into its policy, also numbered 373,735, and thereafter issued said policy to defendant, a photostatic copy of which said policy, dated December 31, 1926, and effective September 27, 1916, is attached hereto, marked Exhibit "1" and expressly made a part of this answer and counterclaim.

III.

Save and except as herein otherwise admitted, denies the allegations of Paragraph III of plaintiff's complaint.

IV.

Denies the allegation of Paragraph IV of the complaint.

V.

Denies the allegations of Paragraph V of the complaint

VI.

Denies the allegations of Paragraph VI of the complaint, but alleges, in this respect, that the plaintiff, The Travelers Insurance Company, knew, as early as the year 1927 that said policy was issued as set forth in defendant's Exhibit "1" hereto attached.

As and for an answer to plaintiff's separate and second cause of action, defendant denies, admits and alleges as follows:

I.

Denies the allegations of Paragraph I of said second cause of action, save and except the same may be admitted as alleged in the answer herein to plaintiff's first cause of action.

II.

Denies the allegations of Paragraph II of said second cause of action. [9]

As and for a separate and distinct answer to plaintiff's said causes of action, this defendant alleges:

I.

That the plaintiff insurer is guilty of laches in the premises as follows:

- a. That at the time defendant insured converted his said policies No. 373,735 and No. 482,573, he then had a loan on said Policy No. 373,735 with the plaintiff insurer; that during the month of July, 1928, this defendant delivered said Policy No. 373,735 into the hands of the plaintiff insurer for the purpose of negotiating a further loan thereon; that said plaintiff insurer had said policy in its possession and did not return the same to this defendant insured until some time during the month of August, 1928.
- b. That during 1931, this defendant insured again negotiated a loan on his said Policy No. 373,735 and on or about the month of September 1931 delivered his said Policy No. 373,735 to the said plaintiff insurer; that while said policy loan was being negotiated, the plaintiff insurer had said policy in its possession and did not return it to this defendant insured until some time during the month of October 1931.

- c. That during 1933, this defendant insured again negotiated a further loan on his said Policy No. 373,735, and on or about the month of October 1933 delivered his said policy into the hands of said plaintiff insurer; that while said policy loan was being negotiated, the plaintiff insurer had said policy in its possession and did not return it to this defendant insured until some time during the month of November 1933. [10]
- d. That during the year 1936, this defendant insured again negotiated a further loan on his said Policy No. 373,735 and on or about the month of June, 1936, delivered his said policy to the said plaintiff insurer; that while said policy loan was being negotiated, the plaintiff insurer had said policy in its possession and did not return it to this defendant insured until some time during the latter part of the month of June 1936.
- e. That by reason of said loans, the plaintiff insured, The Travelers Insurance Company, well and truly knew, as early as the years 1926, 1928, 1931, 1933 and 1936, that said Policy No. 373,735, including the "Special Privileges" provisions thereof, was in the exact form set forth in defendant's Exhibit "1" attached hereto.

That the premiums on said Policy No. 373,735 for \$15,000, dated September 27, 1916, were \$309.75 per annum, while the premiums on said Policy No.

373,735, dated December 31, 1926, for \$10,000 were \$287.50 per annum. That the higher rate charged by the plaintiff for said 1926 policy was principally on account of the special privileges contained in said policy, including Option 1 under "Options Available at Age 65" shown on Page 2 of [11] said policy (Exhibit "1" attached hereto).

- f. That the said plaintiff, although knowing or suspecting or by the exercise of reasonable care and/or diligence and/or prudence should and/or would have known of the exact provisions of said policy, nevertheless remained silent and waited for a period of twenty years and until this defendant had faithfully kept and performed all the terms and conditions of said contract on his part to be performed, including the collection by the plaintiff insurer from the defendant of all twenty of said annual premiums called for in said 1926 policy, before bringing this suit.
- g. That as a result of the acts of the plaintiff insurer The Travelers Insurance Company, in soliciting and importuning this defendant to drop and discontinue said 1918 life insurance policy No. 482,573 in the amount of \$10,000 and the conversion of said life insurance policy No. 373,735, dated September 27, 1916, in the amount of \$15,000 for said converted life insurance policy No. 373,735, dated December 31, 1926, in the amount of \$10,000 with special privileges, this defendant has been prejudiced in that he dropped and discontinued said prior life insurance policies aggregating \$25,000 for his said present policy in the amount of \$10,000 with Special Privileges.

As and for a second, separate and distinct defense to plaintiff insurer's first and second causes of action, this defendant alleges:

I.

That plaintiff insurer's first and second cause of action are outlawed and barred by the express provisions of the Statute of Limitations, to wit: Sections No. 312 and No. 338 of the Code of Civil Procedure, of the State of California, the applicable parts of which read as follows:

Sec. No. 312:

“Civil Actions. Civil actions, without exception, can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued, unless where, in special cases, a different limitation is prescribed by statute.” [12]

And Section No. 338:

“Three years—. . . Fraud and Mistake.

“Within Three years: . . . 4. An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.”

That the plaintiff insurer's present complaint now constitutes a stale and outlawed demand.

As and for a third, separate and distinct defense to plaintiff insurer's said first and second causes of action, this defendant alleges:

I.

That by the express terms of said contract of insurance, the plaintiff insurer is debarred and prohibited from contesting said policy. That in this respect said policy provides in part as follows:

“Incontestability. This contract shall be incontestable after one year from date of issue, except for non-payment of premiums. It is free from conditions as to residence, occupation, travel or place of death. No permit or extra premium will be required for military or naval service in time of war or in time of peace.

“This contract is subject to the privileges and conditions recited on the subsequent pages hereof.”

As and for a counterclaim, defendant alleges:

I.

That the plaintiff, The Travelers Insurance Company is now and at all of the times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Connecticut and duly qualified and licensed in so far as this action is concerned, to transact a general insurance business as a life, accident and health insurance company, by the Insurance Commissioner of the State of California; that defendant is a citizen of the State of California and that the matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.

II.

That heretofore, to wit, on or about the 31st day of December, 1926, [13] said plaintiff made and delivered to defendant its certain policy No. 373735, dated the 31st day of December, 1926, but effective from September 27, 1916, insuring the life of defendant, and after the payment by defendant of thirty (30) annual premiums and his attaining the age of sixty-five (65) years, said plaintiff promised and agreed in writing in said policy, among other things, to pay defendant as follows:

“Special Privileges

Options Available at Age 65. The Insured may select in lieu of all other benefits hereunder one of the following options to become available upon the surrender of this contract at its anniversary when the Insured shall have reached the age of 65, the amount of these options being stated for each \$500 of insurance:

1. Receive a cash payment of \$1,083.00.
2. Receive a cash payment of \$739.00 and a paid-up contract payable at death for \$500.00.
3. Receive a paid-up contract payable at death for \$1,574.00.
4. Receive an annual income of \$112.83 payable during the natural life of the Insured.”

III.

That a photostatic copy of said policy is attached hereto, marked Exhibit “1” and expressly made a part of this counterclaim.

IV.

That under the provisions of said policy and the "Options Available at Age Sixty-five," provided in said policy, defendant has elected and does elect to receive a cash payment of Twenty-one Thousand Six Hundred Sixty Dollars (\$21,660.00) in full settlement of the amount due under said policy as provided in said "Special Options."

V.

That under the express terms of said policy the plaintiff agreed to pay to defendant said sum of \$21,660.00. [14]

VI.

That defendant, since said 27th day of September, 1916, has paid to plaintiff all of said thirty (30) annual premiums due under said policies No. 373,735, and has paid to plaintiff all sums and premiums called for in said policy and due from defendant to the plaintiff.

VII.

That defendant attained the age of sixty-five (65) years on August 21st, 1946, and that by reason thereof said policy, according to the terms thereof, matured on September 27, 1946.

VIII.

That, notwithstanding the fact that defendant has performed all of the terms and obligations of said contract on his part to be performed, said plaintiff has failed and refused and still fails and refuses to pay to defendant said sum of \$21,660.00.

Wherefore, defendant prays that plaintiff take nothing by its said action; that this defendant have judgment against said plaintiff for said sum of Twenty-one Thousand Six Hundred Sixty Dollars (\$21,660.00), plus interest from the 27th day of September, 1946; for costs of this action and for such other and further relief as to this Court may seem proper.

ALVIN GERLACK,

Attorney for Defendant. [15]

State of California,

City and County of San Francisco—ss.

George H. Richardson, being first duly sworn, deposes and says:

That he is the defendant in the above entitled action; that he has read the foregoing Answer and Counterclaim and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated on information and belief and as to those matters that he believes it to be true.

GEORGE H. RICHARDSON

Subscribed and sworn to before me this 8th day of November, 1946.

[Seal]

ALFRED D. MARTIN,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Nov. 8, 1946.

[Title of District Court and Cause.]

ANSWER TO COUNTERCLAIM

Now comes The Travelers Insurance Company, plaintiff in the above-entitled action, and files this its answer to defendant's counterclaim in said action and avers and denies as follows:

Admits the allegations of Paragraphs I, II, III, IV and V.

Admits the allegations of Paragraph VI but avers that the premiums specified as due on the policy of insurance issued to defendant were not proper premiums for said policy in this that said premiums were the proper premiums for a policy of insurance carrying with it the right to receive at age 65 for each \$1,000.00 of insurance a cash payment of \$395.00 and a paid up contract at death for \$1,000.00, but not the right to receive at age 65 a cash payment of \$739.00 for each \$500.00 of insurance and a paid up contract at death for \$500.00.

Admits the allegations of Paragraphs VII and VIII, but [17] avers that while the defendant has performed the terms and conditions indicated by mistake in the policy issued to him, he has not performed the terms and conditions omitted by mistake from said policy and has only performed the terms and conditions in the policy of insurance applied for by him.

As a further and separate answer and defense to said counterclaim, plaintiff alleges:

I.

That heretofore, to wit: on the 13th day of December, 1926, defendant applied to plaintiff that there be issued to defendant an insurance annuity in the amount of \$10,000.00 on the uniform premium plan; that a copy of said application is attached to the Complaint on file in this action, marked Exhibit "A" and made a part thereof, and by this reference said application is made a part hereof.

II.

That thereafter and on the 31st day of December, 1926, pursuant to said application, plaintiff made, issued, executed and delivered to defendant its certain policy of insurance, a copy of which is attached to the Answer and Counterclaim on file herein and by this reference said policy is made a part hereof.

III.

That by mutual mistake said policy of insurance so issued to defendant was not the policy of insurance applied for by defendant, nor the policy intended to be issued by plaintiff.

IV.

That a copy of the policy of insurance applied for by defendant is attached to the Complaint on file in this action, marked Exhibit "C", and by this reference is made a part hereof.

V.

That plaintiff does not keep any copies of policies

issued by it to its assureds and did not keep any copies of the [18] policy issued by it to defendant, and nothing in plaintiff's records would disclose the mistake in furnishing the wrong policy form to defendant; that plaintiff's first knowledge of said mistake was in the month of March, 1946, when said policy of insurance became the subject of discussion between plaintiff and the assignee of said policy of insurance, The Crocker First National Bank of San Francisco.

As and for a further separate answer and defense to said Counterclaim, plaintiff alleges:

I.

Special reference is hereby made to the allegations of Paragraphs I, II, IV and V of the first further and separate answer and defense to said Counterclaim and by this reference each and all of the allegations thereof are incorporated and made a part of this further and separate defense with like force and effect as if fully set forth herein in full.

II.

That by mistake of plaintiff, which defendant at the time knew or suspected, said policy of insurance so issued did not truly express the intention of the parties thereto in this that said policy was not the policy of insurance applied for by defendant nor the policy intended to be issued by plaintiff.

Wherefore, plaintiff prays judgment as prayed for in its Complaint herein.

JOSEPH T. O'CONNOR,
HAROLD H. COHN,

Attorneys for Plaintiff. [19]

State of California,
City and County of San Francisco—ss.

Joseph T. O'Connor, being first duly sworn, deposes and says:

That he is one of the attorneys for the plaintiff in the foregoing action; that he has read the foregoing Answer to Counterclaim and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information or belief and as to those matters he believes it to be true; that this verification is made by affiant and not by said plaintiff for the reason that said plaintiff and all officers authorized to swear oaths on its behalf are absent from the City and County of San Francisco in which City and County the attorneys for said plaintiff have their offices.

JOSEPH T. O'CONNOR

Subscribed and sworn to before me this 27th day of November, 1946.

[Seal] LOUIS WIENER,
Notary Public in and for the City and County of
San Francisco, State of California.

(Admission of Service)

[Endorsed]: Filed Nov. 29, 1946. [20]

United States District Court for the Northern
District of California, Southern Division

No. 26322-S

THE TRAVELERS INSURANCE COMPANY,
Plaintiff,

vs.

GEORGE H. RICHARDSON,

Defendant.

OPINION AND ORDER

Defendant on December 13, 1926, was insured under two life insurance policies issued by the plaintiff. On that date he signed an application for an "insurance annuity, age 65, on the uniform premium plan" in the principal amount of \$10,000. The premium called for by such a policy at the then age of the defendant was \$287.50 per year. This type of policy was based upon an insurance unit of \$1,000 and entitled insured at the maturity age to receive a cash payment of \$390 for each \$1,000 of insurance and a paid up contract payable at death for \$1,000. The insured was also entitled to receive for each \$1,000 of insurance at maturity age and in lieu of all other privileges, a cash payment of \$1,083. Plaintiff alleges, and the court finds, that it erroneously selected the wrong printed form of policy and instead of the "insurance annuity, age 65, on the uniform premium plan" there was issued to the defendant by the plaintiff a policy known as "pension policy, age 65." The pension policy was based on an insur-

ance [21] unit of \$500 and contained a special privilege entitling the insured at the age of 65 to receive \$739 per year for each \$500 of insurance and a paid up contract payable at death for \$500; in lieu of all of the other privileges under this form of policy the insured was entitled to receive at the maturity age for each \$500 of insurance, a cash payment of \$1083. Yearly premium for this policy at the defendant's then age was \$467.50.

Premiums called for in the policy as issued have been paid yearly by defendant. It appears that the plaintiff keeps no copies of policies issued and the testimony indicates that the company's records did not disclose the error. The records which are kept merely indicate the assured's name, the type of policy and the premium which he is to pay thereon. The mistake was not discovered until March, 1946, when a bank, to which defendant had applied for a loan submitting the policy as collateral, inquired of the plaintiff as to the cash value of the policy. It does appear, however, that on four other occasions the policy had been sent to the home office of the plaintiff for accommodation of the defendant on account of loans made to the defendant. By way of explanation as to why plaintiff did not discover the error on the other times that the policy was in its possession, the testimony indicates that when the policies were received they were referred to a department of the plaintiff which checks merely upon the cash or loan value and registers the assignment for the purpose of the loan. It is shown that that department has no connection with the

issuing department or the policy writing department and that the table of loan values was correct for the insurance annuity policy and that there was no occasion, in making loans on the policy, to refer to the special provisions of the policy where the error was located. The evidence further discloses that at the time [22] of applying for the policy the defendant was an insurance agent, listed as such under the laws of the State of California, and was working under a contract for the plaintiff soliciting insurance. The defendant claims that he was with the plaintiff for less than a year as such agent and that his work during that period was almost exclusively in writing accident insurance. The evidence is in conflict as to whether, during such period of employment, he received training in life insurance in a school of instruction which it appears was maintained by the plaintiff for its agents, or that he had in his possession a manual issued by plaintiff to its agents which describes the different forms of policies, rates, privileges, loan values, etc. It is apparent that the premiums upon the policies which the defendant had prior to December 13, 1926, were burdensome and it would seem that defendant was anxious to surrender those policies for their cash value and take out a new policy calling for a lower premium.

The plaintiff in this action seeks to reform the policy to embrace only the provisions above outlined to an insurance annuity, age 65, on the uniform premium plan.

Preliminary consideration must be given to the

position taken by the defendant relative to the incontestable condition contained in the policy. That provision reads: "This contract shall be incontestable after one year from date of issue, except for non-payment of premiums." The first reported case that dealt with the problem as to whether an action to reform is within such a clause as represented in this case is *Columbian National L. Ins. Co. v. Black* 35 F. 2d 571. There, as here, a reformation was sought. The court pertinently observed that it would hardly be suggested that an assured who brings an action to reform a policy was [23] contesting the policy within the meaning of a clause of the same import. The court added that the clause was not one sided and that the right to have the contract express the actual agreement is as available to the assured as to the assurer. The court further stated that although an actual contest may not be found under the cloak of reformation still an action to correct a purely clerical error in the policy issued so as to speak truthfully the agreement is not embraced within the incontestable clause. To the same import see the later cases of *Young v. Met. Life Ins. Co.* 28 Ohio N.P.N.S. 179 and *New York Life Ins. Co. v. Street* 265 S.W. 397. Since the instant action is one in reformation seeking to have the policy express truthfully the agreement between the assured and assurer, an action to reform is not intended or understood to be included within the prohibited contests and is not effected by the above mentioned provision.

An insurance policy comes within the general rule under which a contract is subject to reformation in a proper case if through fraud or mistake it does not express the true agreement. *Genuser v. Ocean Accident & Guarantee Corp.* 57 Cal. 29 App. 2d 979; *Pacific Indemnity Co. v. Industrial Accident Comm.* 29 Cal. App. 2d 414. Although an unilateral mistake is not ground for the relief, (*Metropolitan Life Ins. Co. v. Asofsky*, 38 F. Supp. 464; *Atlantic Life Ins. Co. v. Pharr*, 59 F. 2d 1024) a mistake by one party to the knowledge of the other is equivalent to a mutual mistake. *Mates v. Penn. Mut. Life Ins. Co.*, 55 N.E. 2d 770. *Williston on Contracts*, Vol. 3, Sec. 1497. The knowledge of the mistake on the part of the party against whom reformation is sought must be such as to justify an inference of fraud or bad faith.

I think that the evidence required a finding of mutual mistake. Thirty yearly premiums paid by defendant (the first ten payments being covered by the cash or surrender value of the [24] original two policies) total \$8625. During the twenty years from the writing of the policy in question he was protected by \$10,000 in insurance. If his position is sustained he is now entitled to what he seeks to recover by his counterclaim, the sum of \$21,660. The amount which he would now be entitled to had the policy been issued to him which was applied for is the sum of \$10,830. If he prevails he receives just twice the amount which he would be entitled to under the policy which was ordered and which plaintiff intended to deliver. It is incredible that

defendant did not familiarize himself with the special privileges. He was not a novice in the business world. He admits that he read the policy, apparently shortly after he received it. He had reasons for acquiring the policy. One reason was to afford his family protection. Another was to have an endowment should he reach the age of 65. I am satisfied that he read these provisions and, if he did read them, he must have realized that a mistake had been made. He was an agent of plaintiff, authorized to write just such policies. He must have known that, during the time he would be paying the premiums, a reserve was being set up to meet, when invested, the prospective liability under the policy and that the reserve was prudently invested at low returns. He knew that out of the income of the company is paid its operating expenses. As an insurance agent I am persuaded that he did receive instruction in life insurance writing and that he had readily at his elbow complete information as to the different kinds of policies being written by the company. He was aware that his company could not issue generally the policy which was issued and remain in business. No other conclusion comports with the facts.

But defendant says that he believed, from the statements made to him by the company's agents and officials, that the new [25] policy would pay him substantially the same benefits as the superceded policies conferred. As plaintiff points out, it is impossible for defendant to surrender \$25,000 in policies calling for yearly premiums in excess

of \$500, one of which policies, a \$15,000 policy, matured at age 80, and receive a \$10,000 policy calling for \$287.50 premiums and granting the same rights on his sixty-fifth birthday as provided in the ones surrendered. Besides having had experience in the business world, defendant, his protests to the contrary notwithstanding, had been writing accident insurance for several months and knew something about the insurance business in general and underwriting in particular. I do not believe that such representations were made to him or that he could have understood from anything stated to him that he would receive such benefits. He knew that he applied for a different kind of policy than the one delivered; he must have known the benefits appurtenant to such a policy both at the time he signed the application and at the time he received the policy. The discrepancies between the two are great. The policy revealed to him a patent error.

The conclusion reached is that defendant did notice the error but kept it to himself. The following language in *Columbian Nat. Life Ins. Co. v. Black*, supra, may be quoted pertinently:

“While courts are properly reluctant to alter the terms of a written engagement, even in equity, and do not do so unless the proof is clear and convincing, we are of the opinion that uncontradicted and indisputable facts in this case require the interposition of equity. It is true the defendant on the stand and in his letters denies any mistake on his part. But

his actions speak louder than his words. He applied for an ordinary life policy; without any quibble, and in response to his application, he received a policy that manifestly was in error. He only paid for an ordinary life policy. When he received the policy he either did or did not notice the [26] error. If he did notice it, the mistake was mutual. If he did notice it and said nothing, he was guilty of such inequitable conduct as to amount to fraud. A man presents a check for \$100 to a bank teller. He gets two \$100 bills. No matter how loudly he asserts the lack of mistake on his part, the fact still remains that he was either mistaken or was trying to benefit by the teller's mistake. Without resorting to any oral evidence, the papers in this case on their face bear conclusive proof of a mistake that can be and should be corrected in equity."

The argument that the insured would be prejudiced if relief is granted is not appealing. A party to a contract is not prejudiced under any legal acceptance when required to perform his contract. Equity, looking beyond the writing and to the real agreement, sees rather the prejudice to the insurer if the contract were allowed to stand as written.

Finally, laches is raised as a defense. Section 338 of the California Code of Civil Procedure has no bearing. The limitation period there prescribed, by the express wording of the statute, does not begin until discovery of the mistake. Mere lapse of time may not constitute laches which will bar re-

formation, "particularly where the party seeking reformation has been ignorant of the defect which he seeks to have corrected." 44 C.J. S 1116. To constitute laches there must, in addition to lapse of time, appear a prejudice to the adverse party by the enforcement of the asserted right. In *Prudential Insurance Company v. Deane*, 27 Atl. 2d 365, the insurer discovered the mistake twenty years after the policy had been issued. In deciding against the plea of laches the court said, "No prejudice to respondents from the delay of twenty years, nor 'change of situation during neglectful repose' have been demonstrated. Complainant is willing that the insured should have all which [27] he bargained and paid. In consequence, the defense of laches must fall." Defendant states that he is prejudiced because he is now uninsurable, inferring that had the error been discovered years ago when he may have been insurable he could have obtained the protection and benefits through other insurance which he would be deprived of as a result of this action. But this claim is based on the faulty premise that during these years he has hoped and expected to receive twice as much as he applied for and paid for under this policy. "The prejudice results not from the delay but from his ill begotten hope." *Columbian National Life Ins. Co. v. Black*, supra.

Judgment will be for the plaintiff as prayed for in its complaint. Defendant will have judgment upon his counterclaim for the sum of \$10,830, or, in lieu thereof for such other benefits as he may

elect to take as provided in the policy as reformed. Findings will be prepared and served by counsel for plaintiff in accordance with the local rule.

Dated: February 6, 1948.

DAL M. LEMMON,

United States District Judge.

[Endorsed]: Filed Feb. 6, 1948. [28]

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above entitled cause having heretofore come on regularly for trial before the above entitled Court, and the Honorable Dal M. Lemmon, Judge thereof sitting without a jury, upon the complaint of plaintiff, the answer and counterclaim of defendant to said complaint and the answer of plaintiff to defendant's counterclaim and plaintiff having been present in Court by Joseph T. O'Connor and Harold H. Cohn, its attorneys, and defendant having been personally present in Court and represented by Alvin Gerlack, his attorney, and testimony and evidence having been taken and introduced on the part of plaintiff and defendant, and said cause having been argued by the counsel for the respective parties and submitted to the Court for its decision, and the Court being fully advised now makes the following findings of fact and conclusions of law: [29]

FINDINGS OF FACT

I.

That it is true that plaintiff is a corporation duly organized and existing under and by virtue of the laws of Connecticut, and duly authorized to transact the business of life insurance in the State of California; that it is true that plaintiff is a citizen of the State of Connecticut and defendant is a citizen of the State of California; that it is true that the matter in controversy exceeds, exclusive of interest and costs, the sum of \$3000.00.

II.

That it is true that on the 13th day of December, 1926, defendant applied to plaintiff that there be issued to defendant, an insurance annuity in the amount of \$10,000.00 on the uniform premium plan; that the copy of said application attached to plaintiff's complaint marked Exhibit "A" and made a part of said complaint is a true and correct copy of the application executed by defendant on said 13th day of December, 1926; that the original of said application is in evidence in this action.

III.

That it is not true that on the 3rd day of January, 1927, plaintiff issued any policy of insurance to said defendant; it is true that on the 31st day of December, 1926, pursuant to said application, plaintiff made, issued, executed and delivered to defendant its certain policy of insurance, a true copy of which except for the erroneous date, to wit,

January 3rd, 1927 instead of December 31st, 1926, is attached to plaintiff's complaint and made a part of said complaint.

IV.

That it is true that by mutual mistake, the policy of insurance so issued to defendant by plaintiff was not the policy of insurance applied for by defendant, nor the policy intended to be issued by plaintiff. [30]

V.

That it is true that a copy of the policy of insurance applied for by defendant is attached to plaintiff's complaint marked Exhibit "C" and made a part of said complaint.

VI.

That it is true that plaintiff does not keep any copies of insurance policies issued by plaintiff to its assureds and it is true that plaintiff did not keep any copy or copies of the policy of insurance issued by it to defendant, and it is true that nothing in plaintiff's records would disclose the mistake in furnishing the wrong policy form to defendant; that it is true that plaintiff's first knowledge of said mistake was in the month of March, 1946, when said policy of insurance became the subject of discussion between plaintiff and the assignee of said policy of insurance, the Crocker First National Bank of San Francisco.

VII.

That each and all of the allegations of Paragraph I of the second alleged cause of action in plaintiff's complaint are and each of them is true, except that the date of the issuance, execution and delivery of said policy of insurance marked Exhibit "B" and made a part of said complaint, is the 31st day of December, 1926 and not the 3rd day of January, 1927.

VIII.

That it is true that by mistake of plaintiff, which defendant at the time knew or suspected, said policy of insurance so issued did not truly express the intention of the parties thereto in this, that said policy was not the policy of insurance applied for by defendant, nor the policy intended to be issued by plaintiff.

IX.

That it is true that the allegations of Paragraph II of the first alleged cause of action in plaintiff's complaint are and each of them is true and correct in all particulars; that it is true that on September 27, 1916 plaintiff made, issued, executed [31] and delivered its policy of life insurance numbered 373735 in the amount of \$15,000.00, which policy provided for annual premiums in the amount of \$309.75; that it is true that on December 13, 1918 plaintiff made, issued, executed and delivered to defendant its life insurance policy numbered 482573 in the amount of \$10,000.00; that it is not true that on or about December 13, 1926 plaintiff prevailed

upon defendant to convert said or any life insurance policies, but it is true that on or about December 13, 1926 defendant applied to plaintiff under the application, a true copy of which is attached to plaintiff's complaint and marked Exhibit "A", that he be permitted in lieu of policies numbered 373735 and 482573 that there be issued to him a new contract of insurance also to be numbered 373735 in accordance with the terms of said application; that it is true that thereafter said plaintiff issued a policy to said defendant, a photostatic copy of which said policy dated December 31, 1926 and effective December 27, 1916, is attached to defendant's answer and counterclaim marked Exhibit 1 and made a part of said answer and counterclaim.

X.

That the allegations of Paragraph III of plaintiff's first alleged cause of action are and each of them is true except that the date upon which said policy was made, issued, executed and delivered to defendant is December 31, 1926.

XI.

That the allegations of Paragraph IV of the first alleged cause of action in plaintiff's complaint are and each of them is true.

XII.

That the allegations of Paragraph V of the first alleged cause of action in plaintiff's complaint are and each of them is true. [32]

XIII.

That the allegations of Paragraph VI of the first alleged cause of action in plaintiff's complaint are and each of them is true; and it is not true that the plaintiff, The Travelers Insurance Company, knew, as early as the year 1927 or at any other time or at all prior to the month of March, 1946, that said policy was issued as set forth in defendant's Exhibit 1 attached to said defendant's answer and counterclaim.

XIV.

That each and all of the allegations of Paragraph I of plaintiff's second alleged cause of action are and each of them is true, save and except that the date upon which said policy of insurance was made, issued, executed and delivered is the 31st day of December, 1926.

XV.

That each and all of the allegations of Paragraph II of said second alleged cause of action in plaintiff's complaint are and each of them is true.

XVI.

That it is not true that plaintiff insurer is guilty of laches; that it is true that at the time defendant converted his said policies numbered 373735 and 482573, he then had a loan on policy numbered 373735 with plaintiff; that it is true that in the month of July, 1928 defendant delivered policy numbered 373735 to plaintiff for the purpose of negotiating a further loan thereon and it is true that plaintiff had said policy in its possession until

the month of August, 1928 but it is true that said plaintiff did not discover any error in said policy while said policy was in its hands for the purpose of negotiating any loan or loans thereon; that it is true that in 1931, defendant negotiated a further loan on said policy numbered 373735 and in the month of September, 1931 delivered said policy to said plaintiff, and that said plaintiff had said policy in its possession and did not return it to defendant [33] until October, 1931; but it is true that said plaintiff did not discover any error in said policy while said policy was in its hands for the purpose of negotiating any loan or loans thereon; that it is true that in 1933 defendant negotiated a loan on said policy numbered 373735 and had said policy in its possession from the month of October to the month of November, 1933 for the purpose of negotiating said loan; but it is true that said plaintiff did not discover any error in said policy while said policy was in its hands for the purpose of negotiating any loan or loans thereon; and it is true that during the year 1936 said defendant negotiated a loan on said policy numbered 373735 and that said plaintiff had said policy in its possession during the month of June, 1936 for the purpose of negotiating said loan; but it is true that said plaintiff did not discover any error in said policy while said policy was in its hands for the purpose of negotiating any loan or loans thereon; that it is not true that by reason of said or any loans, plaintiff well and truly or otherwise, or at all, knew as early as the years 1926, 1928, 1931, 1933, 1936 or at any other time, or at

all, until the month of March, 1946 that said policy numbered 373735 included the "special privileges" provisions in the form set forth in defendant's Exhibit 1 attached to said defendant's answer and counterclaim, but on the contrary said defendant did not know that said "special privileges" provisions was in any other form than the special privileges set forth in Exhibit "C" attached to plaintiff's complaint; that it is true that the premiums on said policy numbered 373735 for \$15,000.00 dated September 27, 1916 were \$309.75 per annum; and it is true that the premiums on policy numbered 373735 dated December 31, 1926 for \$10,000.00 were \$287.50 per annum; that it is not true that the rate charged by plaintiff for said 1926 policy was principally or otherwise on account of any special privileges contained in said policy whatsoever, or at all, but said rate charged was the [34] rate fixed by the uniform premium plan as set forth in plaintiff's "Life Manual" dated January 1, 1916 and for which rate defendant applied; that said plaintiff did not know or suspect and could not by the exercise of reasonable care and/or diligence and/or prudence have known of the exact provisions of said policy; that it is true that plaintiff remained silent for a period of twenty years but said plaintiff had no knowledge of said provisions of said policy until the month of March, 1946; that it is true that defendant performed all of the terms and conditions of said contract including the payment of all premiums called for in said policy before plaintiff brought this suit, but said defend-

ant only performed the terms and conditions on his part to be performed in the policy of insurance applied for by him and did not pay the premiums for any benefits in excess of those called for by the policy applied for by him and did not pay any premiums whatsoever for the benefits mistakenly inserted in the policy delivered to him; that it is not true that as a result of any act or omission of plaintiff whatsoever, defendant has been prejudiced in any manner whatsoever, or at all.

XVII.

That it is not true that plaintiff's first and second cause of action or plaintiff's first or second cause of action are, nor is either of them outlawed or barred by the provisions of sections 312 and 338 of the Code of Civil Procedure of the State of California, or either of them or at all; that it is not true that plaintiff's complaint constitutes a stale or outlawed demand.

XVIII.

That it is true that by the express terms of said contract of insurance plaintiff is debarred and prohibited from contesting said policy but it is also true that the present suit is not a suit to contest said policy within the meaning of the incontestability clause set forth in defendant's answer and counterclaim. [35]

XIX.

That the allegations of Paragraph I of defendant's counterclaim are true.

XX.

That it is true that on or about the 31st day of December, 1926 plaintiff made and delivered to defendant, its certain policy of insurance numbered 373735 dated December 31, 1926 and effective from September 27, 1916 and insuring the life of defendant, and it is true that the form of said policy delivered by plaintiff to defendant provided that after payment by defendant of thirty annual premiums and defendant's attaining the age of 65 years, said policy provided in words and figures, as follows:

"Special Privileges

"Options Available at Age 65.—The Insured may select in lieu of all other benefits hereunder one of the following options to become available upon the surrender of this contract at its anniversary when the Insured shall have reached the age of 65, the amount of these options being stated for each \$500 of insurance:

1. Receive a cash payment of \$1,083.00
2. Receive a cash payment of \$739.00 and a paid-up contract payable at death for \$500.00
3. Receive a Paid-up contract payable at death for \$1,574.00
4. Receive an annual income of \$112.83 payable during the natural life of the Insured."

But in this connection, the Court finds that it is also true that said special privileges hereinabove

set forth were inserted in said policy by mutual mistake and by mistake of plaintiff which defendant at the time of execution and delivery knew or suspected and said defendant knew that said policy of insurance so issued did not truly express the intention of the parties thereto in this, that said policy was not the policy of insurance applied for by defendant, nor the policy of insurance intended to be issued by plaintiff. [36]

XXI.

That it is true that a photostatic copy of said policy is attached to defendant's answer and counterclaim.

XXII.

That it is true that the express terms of said policy call for the payment to said defendant of the sum of \$21,660.00 but said terms were inserted in said policy by mutual mistake of the parties and by mistake of plaintiff which said defendant at the time knew or suspected, and said policy so issued did not truly express the intention of the parties thereto in this, that said policy provision was not the provision applied for by defendant nor the provision intended to be issued by plaintiff; that the sole agreement of the parties was that plaintiff agreed to pay to defendant the sum of \$10,830.00 and not the sum of \$21,660.00.

XXIII.

That the allegations of Paragraph VI of said counterclaim are and each of them is true.

XXIV.

That it is true that defendant attained the age of 65 years on August 21, 1946 and that said policy matured on September 27, 1946.

XXV.

That it is true that defendant has performed all of the terms and obligations of said contract on his part to be performed under the policy issued to him, but it is not true that he has performed the terms and conditions omitted by mistake from said policy and he has only performed the terms and conditions in the policy of insurance applied for by him; and it is true that plaintiff has failed and refused to pay defendant the sum of \$21,660.00 or any sum exceeding \$10,830.00. [37]

XXVI.

That it is true that the premiums specified as due on the policy of insurance issued to defendant were not proper premiums for said policy in this, that said premiums were the proper premiums for a policy of insurance carrying with it the right to receive at age 65 for each \$1000.00 of insurance, a cash payment of \$395.00 and a paid-up contract at death for \$1000.00, but not the right to receive at age 65 a cash payment of \$739.00 for each \$500.00 of insurance and a paid-up contract at death for \$500.00.

XXVII.

That it is true that while defendant has performed the terms and conditions indicated by mis-

take in the policy issued to him, it is also true that he has not performed the terms and conditions omitted by mistake from said policy and it is true that said defendant has only performed the terms and conditions in the policy of insurance applied for by him.

XXVIII.

It is true that on the 13th day of December, 1926, defendant applied to plaintiff that there be issued to defendant an insurance annuity in the amount of \$10,000.00 on the uniform premium plan and it is true that a copy of said application is attached to plaintiff's complaint on file in this action marked Exhibit "A" and made a part of said complaint.

XXIX.

It is true that on the 31st day of December, 1926 pursuant to said application, plaintiff made, issued, executed and delivered to defendant its certain policy of insurance, a true copy of which is attached to the answer and counterclaim on file in this action and marked Exhibit 1.

XXX.

It is true that by mutual mistake, said policy of insurance so issued to defendant was not the policy of insurance applied for by defendant, nor the policy of insurance intended to be issued [38] by plaintiff.

XXXI.

It is true that a true copy of the policy of insurance applied for by defendant is attached to the

complaint on file in this action and marked Exhibit "C."

XXXII.

It is true that plaintiff does not keep any copies of policies issued by it to its assureds and did not keep any copy or copies of the policy issued by it to defendant, and it is true that nothing in plaintiff's records could or did disclose the mistake in furnishing the wrong policy form to defendant; it is true that plaintiff's first knowledge of said mistake was in the month of March, 1946.

XXXIII.

That the allegations of Paragraph I of plaintiff's second separate answer and defense to said counterclaim are true.

XXXIV.

That it is true that by mistake of plaintiff, which defendant at the time knew or suspected, said policy of insurance so issued did not truly express the intention of the parties thereto in this, that said policy was not the policy of insurance applied for by defendant, nor the policy intended to be issued by plaintiff.

CONCLUSIONS OF LAW

I.

That said policy of insurance numbered 373735 as issued contains special privileges erroneously inserted in said policy by mutual mistake of the parties and by mistake of plaintiff which defend-

ant at the time knew and suspected, in this, that said policy as issued provided as follows: [39]

“Special Privileges

“Options Available at Age 65. The Insured may select in lieu of all other benefits hereunder one of the following options to become available upon the surrender of this contract at its anniversary when the Insured shall have reached the age of 65, the amount of these options being stated for each \$500 of insurance:

1. Receive a cash payment of \$1,083.00
2. Receive a cash payment of \$739.00 and a paid-up contract payable at death for \$500.00
3. Receive a paid-up contract payable at death for \$1,574.00
4. Receive an annual income of \$112.83 payable during the natural life of the Insured.”

instead of providing:

“Special Privileges

“Options Available at Age 65. The Insured may select in lieu of all other benefits hereunder one of the following options to become available upon the surrender of this contract at its anniversary when the Insured shall have reached the age of 65, the amount of these options being stated for each \$1,000 of insurance:

1. Receive a cash payment of \$1,083.00

2. Receive a cash payment of \$395.00 and a paid-up contract payable at death for \$1,000.00
3. Receive a paid-up contract payable at death for \$1,574.00
4. Receive an annual income of \$112.83 payable during the natural life of the Insured.”

II.

That plaintiff is entitled to a judgment reforming said policy of insurance so as to express the true intention and agreement of the parties on both plaintiff’s first and second causes of action set forth in plaintiff’s complaint, together with a judgment for its costs of suit herein expended.

III.

That plaintiff’s action for reformation of said policy of insurance is not barred by any statute of the State of California or provision of said policy of insurance.

IV.

That defendant is entitled to a judgment upon his counterclaim for the sum of \$10,830.00 and no more, or in lieu thereof for such other benefits as defendant may elect to take as [40] provided in the policy as reformed.

Let a judgment be entered accordingly.

Dated Feb. 26, 1948.

DAL M. LEMMON,

Judge of the U. S. District
Court.

[Endorsed]: Filed Feb. 26, 1948.

In the District Court of the United States, for the
Northern District of California, Southern
Division

No. 26322-S

THE TRAVELERS INSURANCE COMPANY,
Plaintiff,

vs.

GEORGE H. RICHARDSON,

Defendant.

JUDGMENT

The above entitled cause having heretofore come on regularly for trial before the above entitled Court and the Honorable Dal M. Lemmon, Judge thereof, sitting without a jury, upon the complaint of plaintiff, the Answer and Counterclaim of defendant to said Complaint, and the Answer of plaintiff to said defendant's Counterclaim and plaintiff having been present in Court by Joseph T. O'Connor and Harold H. Cohn, its attorneys, and defendant having been personally present in Court and represented by Alvin Gerlack, his attorney, and testimony and evidence having been taken and introduced on the part of plaintiff and defendant and said cause having been argued by counsel for the respective parties, and submitted to the Court for its decision and the Court being fully advised and having heretofore made and rendered its decision in writing, setting forth its Findings of Fact and Conclusions of Law in said cause, which decision, Findings of Fact and Conclusions [42] of

Law have been filed herein, and ordered that judgment be entered in accordance therewith;

Wherefore, by reason of the law and the findings aforesaid:

It is hereby ordered, adjudged and decreed and this Court does hereby order, adjudge and decree as follows, to wit:

That said policy of life insurance issued by plaintiff on the life of George H. Richardson, defendant, which said policy is numbered 373735 as issued contains special privileges erroneously inserted in said policy by mutual mistake of the parties and by mistake of plaintiff which defendant at the time knew and suspected as follows:

“Special Privileges

“Options Available at Age 65.—The Insured may select in lieu of all other benefits hereunder one of the following options to become available upon the surrender of this contract at its anniversary when the Insured shall have reached the age of 65, the amount of these options being stated for each \$500. of insurance:

1. Receive a cash payment of \$1,083.00
2. Receive a cash payment of \$739.00 and a paid-up contract payable at death for \$500.00
3. Receive a Paid-up contract payable at death for \$1,574.00
4. Receive an annual income of \$112.83 payable during the natural life of the Insured.”

And it is further ordered, adjudged and decreed and this Court does hereby order, adjudge and decree that said policy of insurance should have provided as issued for special privileges as follows:

“Special Privileges

“Options Available at Age 65.—The Insured may select in lieu of all other benefits hereunder one of the following options to become available upon the surrender of the contract at its anniversary when the Insured shall have reached the age of 65, the amount of these options being stated for each \$1,000 of insurance:

1. Receive a cash payment of \$1,083.00
2. Receive a cash payment of \$395.00 and a paid-up contract payable at death for \$1,000.00
3. Receive a Paid-up contract payable at death for \$1,574.00
4. Receive an annual income of \$112.83 payable during the natural life of the Insured.” [43]

It is further ordered, adjudged and decreed that said policy of insurance be reformed so as to express the true intention and agreement of the parties on both plaintiff’s first and second causes of action by inserting in lieu of the special privileges inserted in said policy as written, the following special privileges:

“Special Privileges

“Options Available at Age 65.—The Insured may select in lieu of all other benefits here-

under one of the following options to become available upon the surrender of the contract at its anniversary when the Insured shall have reached the age of 65, the amount of these options being stated for each \$1,000 of insurance:

1. Receive a cash payment of \$1,083.00
2. Receive a cash payment of \$395.00 and a paid-up contract payable at death for \$1,000.00
3. Receive a Paid-up contract payable at death for \$1,574.00
4. Receive an annual income of \$112.83 payable during the natural life of the Insured."

It is further ordered, adjudged and decreed that neither of plaintiff's causes of action for reformation of said policy of insurance is barred by any statute of the State of California or provision of said policy of insurance; and

It is further ordered, adjudged and decreed that defendant above named do have and recover judgment from plaintiff for the sum of Ten Thousand Eight Hundred Thirty (\$10,830.00) Dollars together with interest thereon as provided by law from September 27, 1946 and no more, or in lieu thereof, for such other benefits as defendant may elect to take as provided in said policy as reformed; and

It is further ordered, adjudged and decreed that plaintiff above named do have and recover from defendant above named, its costs of suit expended in the sum of \$.

Dated: February 26th, 1948.

DAL M. LEMMON,

United States District Court
Judge.

The foregoing Judgment is hereby approved as to form as provided in Rule 5 (d).

ALVIN GERLACK,

Attorney for defendant.

[Endorsed]: Filed Feb. 26, 1948. [44]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that George H. Richardson, Defendant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on February 27, 1948.

/s/ ALVIN GERLACK,

Attorney for Defendant and
Appellant.

[Endorsed] Filed Mar. 26, 1948. [45]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL

Now comes the above named Defendant and Appellant and pursuant to Subdivision (d) of Rule 75 of the Federal Rules of Civil Procedure files this, his designation of the points on which he intends to rely on his appeal herein to the United States Circuit Court of Appeals for the Ninth Circuit:

1—The said District Court erred in finding that the Plaintiff (Appellee) was not guilty of laches in instituting this present action in 1946 when it had the clear opportunity, in 1926 when it issued the policy, and again in 1928, 1931, 1933 and 1936 to discover the claimed error in the issuance of the policy, but nevertheless waited some 19 years after issuance of the policy before bringing this action.

2—The District Court erred in finding and concluding that the California Statute of Limitations, Code of Civil Procedure Sections 312 and 338 did not apply to the instant action.

3—That said District Court erred in finding that the “incontestable clause” of the policy did not apply to the present suit in the instant case.

4—The said District Court erred in finding that the Plaintiff (Appellee) only discovered for the first time the claimed error in the policy in 1946. In view of the District Court’s finding XVI that the Plaintiff (Appellee) had the policy in his possession four times, namely July and August 1928,

September and October 1931, October and November 1933 and June 1936, the said District Court's findings are inconsistent and contradictory in the following respects to wit:

Finding XVI finds the Plaintiff had the insurance policy in question in its possession in its San Francisco and also in its home office in Hartford, Connecticut in connection with policy loans four different times, namely 1928, 1931, 1933 and 1936, whereas finding XVI also finds that the Plaintiff (Appellee) discovered the claimed mistake of the issuance of the policy for the first time in March 1946 and the said District Court erred in rendering judgment for the Plaintiff (Appellee) based upon such inconsistent and contradictory findings.

5—The said District Court erred in ordering judgment for the Plaintiff (Appellee) in view of the Plaintiff's (Appellee) admitted examination of the policy in question in July and August 1928, September and October 1931, October and November 1933, and June 1936, and the Trial Court's finding XVI to that effect, and what Appellant claims is a clear and unmistakable case of laches on the part of the Plaintiff and (Appellee). [47]

6—The District Court erred in finding that the Defendant (Appellant) was not prejudiced by the Plaintiff (Appellee) waiting 19 years and collecting all of the 20 annual premiums due under the policy and further waiting until the Defendant (Appellant) was almost 65 years of age and obviously uninsurable before bringing the present action.

7—The District Court erred in finding that the policy of insurance was issued through mutual mistake of parties hereto and/or that the policy was issued by mistake of Appellee (Plaintiff) which Appellant (Defendant) at the time knew or suspected and also in finding that the policy as issued was not the policy applied for by the Appellant (Defendant), and in finding that the special privileges inserted in the policy by the Appellee (Plaintiff) was by mutual mistake of the parties and/or by mistake of the Appellee (Plaintiff) which appellant (Defendant) at the time knew or suspected.

/s/ ALVIN GERLACK,

Attorney for Defendant and
Appellant.

[Admission of Service.]

[Endorsed: Filed Apr. 8, 1948. [48]]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF
RECORD ON APPEAL

Comes now the above named Defendant and Appellant and pursuant to the provisions of Rule 75 of the Federal Rules of Civil Procedure, files this, his designation of the portions of the Record and Proceedings to be contained in the Record on his Appeal herein to the United States Circuit Court of Appeals for the Ninth Circuit:

1. Caption
2. Names and addresses of counsel
3. The complaint of Plaintiff
4. The answer and counterclaim of the Defendant
5. The answer of the Plaintiff to Defendant's counterclaim
6. Opinion of the Trial Court
7. The findings of fact and conclusions of law made by the trial court [49]
8. Judgment of the Trial Court
9. Notice of Appeal
10. The designation of Contents of Record on Appeal
11. Statement of points on which Appellant intends to rely on appeal
12. Certified Reporter's transcript of all proceedings at trial of this action.

Dated this 8th day of April, 1948.

ALVIN GERLACK,
Attorney for Defendant.

It is so stipulated

JOSEPH T. O'CONNOR,
HAROLD H. COHN,
Attorneys for Plaintiff.

[Endorsed]: Filed Apr. 8, 1948. [50]

In the District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing pages, numbered from 1 to 52, inclusive, contain a full, true, and correct transcript of the records and proceedings in the cause of *The Travelers Insurance Co. vs. George H. Richardson*, No. 26322 S, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of \$5.20, and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 30th day of April, A. D. 1948.

[Seal]

C. W. CALBREATH,

Clerk,

/s/ E. H. NORMAN,

Deputy Clerk.

In the District Court of the United States for
the Northern District of California, Southern
Division

No. 26322-S

THE TRAVELERS INSURANCE COMPANY,
Plaintiff,

vs.

GEORGE H. RICHARDSON,
Defendant.

Before: Hon. Dal M. Lemmon,
Judge.

REPORTER'S TRANSCRIPT

Thursday, October 16, 1947

Appearances:

Joseph T. O'Connor, Esq., and Harold H. Cohn,
Esq., for Plaintiff.

Alvin Gerlack, Esq., for Defendant.

The Clerk: Travelers Insurance Company vs.
Richardson.

Mr. Cohn: Ready.

Mr. Gerlack: Ready.

The Court: Proceed.

(Thereupon counsel made opening state-
ments.)

Mr. Cohn: Will you stipulate that this is the
application?

Mr. Gerlack: Yes. That is his signature. [1*]

* Page numbering appearing at top of page of original Reporter's
Transcript.

The Court: Offer it in evidence.

Mr. Cohn: The plaintiff will offer it in evidence under stipulation.

The Court: It may be admitted and marked.

(The application is marked Plaintiff's Exhibit 1.)

Mr. Gerlack: It is stipulated that is the application on which the policy was issued.

Mr. Cohn: Yes.

Mr. Gerlack: It is also stipulated that is not in the handwriting of Mr. Richardson except the signature.

Mr. Cohn: Yes, if that is the fact.

Mr. Gerlack: That is a fact is it not, the signature is the only thing in your handwriting?

Mr. Richardson: Yes.

Mr. Gerlack: We will stipulate that a policy was in fact issued.

Mr. Cohn: You will stipulate that this was the policy that was issued.

Mr. Gerlack: Yes.

(The policy was marked Defendant's Exhibit A.)

The Court: Is it stipulated that the amounts called for in the policy were paid?

Mr. Cohn: Yes.

Mr. Gerlack: I call your attention to the fact that there are no payments called for in the application.

Mr. Cohn: The application does not say anything about the premium. The application only

states the form of policy [2] that is applied for.

The Court: Are there any other stipulations that counsel may suggest?

Mr. Gerlack: Will you stipulate that the Home office had the policy in its possession four different times?

Mr. Cohn: Yes, we admit that, but we will show that when a policy goes to the company for a loan it goes to an entirely different division; it goes to the policy loan division which has nothing to do with the policy writing division.

Mr. Gerlack: We think that is immaterial.

The Court: Is there any other stipulations you want to make?

Mr. Cohn: I don't know whether counsel is willing to do it or not but I will ask him: will you stipulate that the premium called for by this policy was not the premium called for by the pension form of policy, or do you want me to prove it?

Mr. Gerlack: I cannot stipulate to that; I have no facts on which to base it.

The Court: Call your first witness.

HAROLD WATERMAN

called for the plaintiff; sworn.

The Clerk: Will you state your name to the Court?
A. Harold A. Waterman.

Q. (By Mr. Cohn): Mr. Waterman, where do you reside?

A. Waterford, Connecticut, a town adjoining Hartford. [3]

(Testimony of Harold A. Waterman.)

Q. What is your business?

A. I am Assistant Secretary of the Travelers Insurance Company.

Q. In Hartford, Connecticut? A. Yes.

Q. You have you been with it how long?

A. I have been with the Travelers Insurance Company for thirty-one years.

Q. How long have you been Assistant Secretary? A. Three years.

Q. Are you connected with any particular branch or department of the company? A. Yes.

Q. What department or branch are you connected with?

A. Life underwriting department.

Q. Is that the department of the company that handles life insurance? A. Yes.

Q. Now, Mr. Waterman, are you familiar with the practice of the company with respect to keeping policies of insurance? A. Yes.

Q. What is the practice of the company in this regard?

A. Our practice in that regard is to keep a master form of all policies that the Travelers Insurance Company has issued since its inception. [4]

Q. Do you keep copies of every individual policy of life insurance that you issue to a policyholder?

A. No, we do not.

Q. What is the practice of the company? How do you know what a policy really is? Will you explain that to the court?

A. I might answer that in this way, when the

(Testimony of Harold A. Waterman.)

application, examination, and other papers incidental to the file arrive in the Home Office they are all assembled together; they pass through the various departments, up to the point of underwriting; that is the point where we decide as to the acceptability of the policy; if the application is approved the file then moves on to what we call our issuing or policy writing division. At that point there is a detail of the various features in connection with the issue of the contract, such as the policy form to be issued, the cash value which was to be put in that particular contract, and any other features which might be incident to the issue of such a policy.

Q. Now when the policy is issued to an insured what record do you make of that, if any?

A. We have in that file what we call a stub with the name of the individual, the branch office, and all underwriting data is kept in that file, that is up to the point of underwriting procedure; following that underwriting another stub is placed over the top of the original stub, and that [5] stub shows the policy form of contract which presumably has been issued and the premium for the coverage in its entirety. From that we establish records which are sent to our various departments necessary for the future handling of that particular issue.

Q. Do I understand then Mr. Waterman, that this is what you retain, the stub?

A. We retain the whole file, the complete file in every case of a policy that has been issued right

(Testimony of Harold A. Waterman.)

on through from the application on; everything incident to the case.

Q. What you mean is this, you do not keep a copy of the policy, do you? A. No, we do not.

Q. Incidentally do you photograph copies of the policy? A. No, we do not.

Q. How do you know then what kind of a policy has been issued?

A. The only record we have is in connection with the stubs and it is assumed from this data record that each individual who has handled the file has done his job properly and correctly and that is the actual contract.

Q. But you do not have the contract.

A. We do not have the contract.

Q. Will you explain to the court the various steps that an application goes through from the time that the application is approved until the policy itself is issued?

A. The mechanics of the issuance of a policy of life insurance, [6] after the risk has been approved, is that, the file is picked up and moved out to our issuing division; at that point the policy form, the cash value to be used and any other features incident to the issue of the contract are assembled and placed in the file; the case then goes to what we call our stub clerk who sets up the coverage desired and then goes on to the examiner to check the work of the stubber, to make sure that no error has occurred. From that point it goes on to what we call our issuing department.

(Testimony of Harold A. Waterman.)

Q. Would your memorandum, in referring to it, disclose any mistake or error in the policy as issued as far as the terms of it are concerned?

A. No, it would not.

Q. Mr. Waterman, are you familiar with the types of policy issued by The Travelers Insurance Company in 1926 and 1927? A. Yes.

Q. And are you familiar with the policy form that you call your Insurance Annuity?

A. Yes.

Q. Are you also familiar with your policy form known as Pension Insurance, age 65?

A. Yes.

Q. How do you determine the premium which is to be charged for these respective policies? [7]

A. By the amount of exposure on the risk, and on the insurance annuity you have \$1,000 and on your pension contract you have \$500, and you have to take into consideration the annuity portion of the contract, and the premium is based on that.

Q. After determining the premium to be charged for any particular form of insurance do you put that data in any book?

A. Do you have reference to individual cases?

Q. No, in general I mean?

A. Yes, we have a Manual which we issue which shows the proper premium charges for all contracts which we issue.

Q. What is the name of the manual?

A. It is known as Life Manual.

(Testimony of Harold A. Waterman.)

Q. In there are set forth the various premiums charged for the various forms of policy?

A. That is correct.

Q. Now, are you familiar with the premium charge for an annuity policy, and which is known as Insurance Annuity at 65, as issued by the company in 1926 and 1927? A. Yes.

Mr. Gerlack: Is that the one you showed me?

Mr. Cohn: I was going to lay a foundation for it.

Q. Is that the Manual that covers this policy for 1926?

A. Yes, I think that is the Manual that was in force when that contract was issued.

Mr. Cohn: I offer the rate manual in evidence.

The Court: Admitted.

(The life manual is marked Plaintiff's Exhibit 2.)

Q. (By Mr. Gerlack): That was in force in 1926 when the policy was issued? A. Yes.

Q. It applies to this policy?

A. It applies to that policy of insurance.

Q. This calls for a premium of \$287.50 plus \$48.10 for permanent total disability?

A. That is correct.

Q. That is taken out of that manual?

A. Yes.

Q. (By Mr. Cohn): What is the \$287.50 premium for?

A. The \$287.50 is for the insurance annuity policy.

(Testimony of Harold A. Waterman.)

Q. What is the unit? A. \$1,000.

Q. Does that manual also disclose the premium for the pension form of policy? A. It does.

Q. And what is the unit for the pension form?
A. \$500.

Q. What is the premium on that?
A. \$23.38.

Q. For what? A. Per \$500. [9]

Q. And ten times would be what?
A. \$233.80.

Q. That would be for each \$500. A. Yes.

Q. And for \$1,000 you double it, is that correct?
A. Yes.

Q. Which would make it \$467.60?
A. Yes, I believe so.

Q. At any rate it would be twice that?

A. It would be twice that, whatever it is; it would be \$467.60.

Q. When you issue a contract in life insurance what do you do? Do you keep a master form of contract?

A. Yes, we have a master form of contract of every policy ever issued by The Travelers Insurance Company.

Mr. Cohn: You may cross-examine.

Cross-Examination

By Mr. Gerlack:

Q. Mr. Waterman, will you please state what steps the policy goes through that is issued? Let me ask you this: you are familiar with that application; you have seen it before? A. Yes.

(Testimony of Harold A. Waterman.)

Q. That application goes through the local office?

A. Yes.

Q. And then it goes to Hartford, Connecticut, the Home Office? A. Yes.

Q. Then what happens to it? [10]

A. When the application, the examination and all other papers incident to the policy are received they are all assembled together and go through the various channels up to the actual underwriting procedure.

Q. How many people in the local office would have occasion to see it?

A. Probably just one.

Q. How many people in the Home Office would see it before it was finally issued? How many people would probably see that policy?

A. With reference to that particular point, three, the underwriter, the stubber and the man who examines the file.

Q. Do you have somebody that looks it over before it goes out, a final investigator?

A. No.

Q. Now some of the insurance companies, I understand, do micro-film each policy that is issued.

Mr. Cohn: I am going to make an objection.

Mr. Gerlack: This is cross-examination.

A. I don't know of any company that makes microfilms of policies issued.

Q. Your company does not? A. We do not.

Q. Every government check that is issued is micro-filmed before [11] it is released, is it not?

(Testimony of Harold A. Waterman.)

A. I don't know.

Q. That is a regular and customary procedure, is it not? A. I don't know.

Q. Now, as I understand life insurance premiums are supposed to be based on the American Tables of Mortality, is that correct?

A. Not entirely.

Q. In general that is true?

A. That is a part of the method of fixing the premium.

Q. Now then you load that up with your office overhead, your agent's commission and your office expenses? A. Yes.

Mr. Cohn: I cannot see the materiality of this testimony.

Mr. Gerlack: That is one of their contentions, that this man got something he did not pay for. That is to show that the rates they charge for policies vary. That is correct, isn't it?

A. They vary.

Q. What commission does your company pay on a policy such as this, for the original premium?

A. I am not familiar with our commission scale so I could not answer that question.

Q. As a matter of fact it is fifty or sixty per cent of the premium, is it not?

A. It is not, in some cases.

Q. In this type of policy do you know what is paid or was paid [12] in 1926 when this policy was written? A. I do not recall.

(Testimony of Harold A. Waterman.)

Q. Whatever the commission might be would be reflected in the premium?

A. Yes, that is part of the cost of the contract.

Q. There are no two companies that have the same commission,—I mean for a comparable policy; it varies with the overhead, office salaries and other expenses of the company and also the profit which is paid to the stockholders of the company?

A. That is true in part, but another company may charge the same premium for the same type of contract.

Q. That is very unusual, is it not?

A. Not at all.

Q. For instance, your company pays the president \$250,000 a year salary, does it not?

A. I don't know.

Mr. Gerlack: That is all.

Redirect Examination

By Mr. Cohn:

Q. Mr. Waterman, I show you Defendant's Exhibit A and I will ask you to examine it and I will call your specific attention to the Special Privileges section of the policy. I also call your attention to the premium. A. Yes.

Q. Will you take a look at the cash surrender and loan value table? [13] A. Yes.

Q. Have you examined those? A. I have.

Q. Now, will you refer to your Life Manual and tell me first of all what is the premium called for on that policy? Is it the premium called for on an annuity policy or pension policy?

(Testimony of Harold A. Waterman.)

A. It is the premium called for on our Insurance Annuity,—65 contract.

Q. And the table of loan value of the policy, does that refer to the annuity or pension form?

A. It refers to the annuity.

Q. Referring to your Life Manual is the pension form different from the annuity form as to the loan value? A. Yes, it is.

Q. Referring to the Special Privileges section of the policy,—I am referring now to Option No. 2, and also to the insurance annuity of the policy, is that the annuity or the pension form?

A. That is the pension form.

Mr. Cohn: That is all.

Recross-Examination

By Mr. Gerlack:

Q. Mr. Waterman, I neglected to ask you what department of The Travelers are you in?

A. Assistant Secretary of the life department.

Q. What does that mean? [14]

A. Just that—anything to do with the issuing and handling of life insurance contracts.

Q. You mean writing the policies?

A. Underwriting and the writing of the contracts.

Q. Were you in that position in 1926 when this policy was issued?

A. I was then serving in the capacity of chief underwriter of the company.

Q. So this policy came through your department? A. Definitely.

(Testimony of Harold A. Waterman.)

Mr. Gerlack: I think that is all.

Further Redirect Examination

By Mr. Cohn:

Q. I would like to ask one question if I may. I refer you to Plaintiff's Exhibit 1, Mr. Waterman; what is that an application for?

A. That is a request for changing an existing contract which is done in every case where an individual wants to change existing coverage carried in a company.

Q. What change is requested, what type of contract?

A. He asked us that the contract be changed to \$10,000 insurance Annuity age 65.

Q. Insurance Annuity age 65? A. Yes.

Mr. Cohn: That is all.

Mr. Gerlack: That is all.

The Court: We will take a short recess. [14A]
(After recess.)

Mr. Cohn: Your Honor, by stipulation of counsel, at this time for the purpose of establishing that the Crocker National Bank had the policy, I am offering in evidence an assignment by Mr. Richardson and his wife of the policy to the bank; that assignment has since been released.

Mr. Gerlack: What date is that?

Mr. Cohn: April 21, 1937.

Mr. Gerlack: There is no objection to putting that in.

The Court: It may be admitted and marked.

(The assignment is marked Plaintiff's Exhibit 3.)

Mr. Cohn: There is no objection to putting in the release which is dated July 30, 1946.

Mr. Gerlack: I offer it as Defendant's Exhibit.

The Court: It may be admitted and marked.

(The release is marked Defendant's Exhibit B.)

Mr. Gerlack: I might say the object of putting in the last exhibit is to show that from 1937 to 1946, July 30, the policy was not in Mr. Richardson's hands but in the hands of the Crocker National Bank.

JAMES A. WEIGHTMAN

called for the Plaintiff; sworn.

The Clerk: Will you state your name to the court?

A. James A. Weightman. [15]

Q. (By Mr. Cohn): Your name is James A. Weightman? A. Yes.

Q. You are employed by The Travelers Insurance Company, are you? A. Yes, I am.

Q. In what capacity?

A. Assistant Cashier in the San Francisco Branch Office.

Q. Is that the division of the company that handles loans? A. Yes.

Q. I will ask you whether or not in the year 1946 you had some communication or talk with the

(Testimony of James A. Weightman.)

Crocker National Bank regarding the insurance policy which is the subject matter of this lawsuit?

A. Yes, I did.

Q. Can you tell us about when that conversation or talk took place? A. About March, 1946.

Q. Can you tell us who it was with?

A. I believe it was Mr. Creeley.

Q. Of the Crocker National Bank?

A. Yes.

Q. What was the subject matter of that conversation?

Mr. Gerlack: Just a minute. May I ask was the defendant Mr. Richardson there, present at that conversation? A. No. [16]

The Court: The objection is overruled. What was the subject matter of that conversation?

A. We received an inquiry from the bank as to the value under the Special Option in the contract and we in turn told him what the special options were according to the record of the policy in our Home Office.

Q. Did the Crocker National Bank subsequently show you the contract that they had?

A. Yes, I am pretty sure that they did.

Q. Would your records indicate that, after refreshing your recollection on that point?

A. Yes, they did permit us to look at the contract.

Q. And is that the first time that you had seen the special privilege portion of the contract that Richardson had? A. Yes, it was.

(Testimony of James A. Weightman.)

Q. When you saw that what did you do?

A. I wrote to the Home Office of our company and advised them that we had been permitted to inspect the contract and that in my opinion the options were incorrect for an insurance annuity 65 form of contract.

Q. Then did you receive certain instructions from your Home Office?

A. Yes, I did. They said that my interpretation of the options were correct and asked me to write to the person concerned, [17] Mr. Richardson, and request the return of the contract for correcting for those errors.

Q. When was that?

A. Could I look for the date?

Q. Yes.

A. The Home Office wrote to me giving me this advice on March 29, 1946.

Q. What was the date of your communication to the Home Office? A. March 22, 1946.

Q. When was your communication with the Crocker National Bank?

A. That was not in writing. Those were telephone conversations and one conversation at our office with a representative of the Crocker National Bank just prior to March 22; it might have been that day or one or two days prior to that, but approximately that time.

Q. Then did you follow the Home Office instructions?

(Testimony of James A. Weightman.)

A. Yes, I wrote to Mr. Richardson according to the instructions on April 4, 1946.

Mr. Cohn: Do you have that letter, the original?

Mr. Gerlack: What date?

Mr. Cohn: A letter dated April 4, 1946, to Mr. Richardson.

Mr. Gerlack: I will stipulate to save time that they entered into a controversy after the company wrote to Mr. Richardson asking him to return the policy, and he refused and we had some discussion back and forth on which there was no agreement. [18]

Mr. Cohn: I will accept that stipulation. I want to ask one further question in that regard.

Q. Pursuant to one of your letters—you wrote a number, did you? A. More than one.

Q. Did Mr. Richardson come into the office of The Travelers Insurance Company? Do your records show that? By "the office" I mean the office at 315 Montgomery Street, San Francisco?

Mr. Gerlack: I have the original letter.

A. About May 16, 1946, I saw Mr. Richardson in our office. Does that answer your question?

Q. (By Mr. Cohn): Yes. At that time did he say anything to you about surrendering the policy for correction?

A. He said that it was his plan to let the matter ride until the maturity of the policy.

Q. Now then, do you handle loans for The Travelers Insurance Company? A. Yes, I do.

Q. On policies? A. Yes, I do.

(Testimony of James A. Weightman.)

Q. Will you state whether or not the loan division of the company is the same or different from the underwriting division?

A. They are different departments.

Q. And in the Home Office of the company they are different?

A. They are separate departments.

Q. Do you personally handle the making of loans on policies? [19] A. Yes, I do.

Q. In making loans on policies do you have any occasion to refer to the Special Privileges section of the policy? A. No.

Mr. Gerlack: We will object to that as immaterial, irrelevant and incompetent. They had the opportunity to do that.

The Court: The objection is overruled.

A. We have no occasion to look at the section of the policy which refers to Special Privileges at maturity in order to make loans because they have no bearing on the loan value.

Q. (By Mr. Cohn): What does have bearing on the loan value?

A. There is a table in the policy headed "Cash and Loan Values" and that is what they refer to, the number of the policy, the insured's name, to be sure that we have the correct contract, and then we refer to the table of the loan value in the policy which is entirely separate from the Special Privileges Section; and we refer to that and calculate the loan value.

(Testimony of James A. Weightman.)

Q. In other words you do not read the whole policy in order to make a loan on it?

A. No. The policyholders would get very slow service on loans if we had to stop and do that.

Mr. Cohn: That is all.

Cross-Examination

By Mr. Gerlack:

Q. Mr. Weightman, did you handle the loan in 1929? [20] A. No, I did not.

Q. Did you handle the loan in 1931?

A. No, I did not.

Q. Didn't it go through your office?

A. It went through our office but I did not handle it.

Q. The option form was in the policy all the time and if you had looked at it you could have seen it, couldn't you?

Mr. Cohn: I will object to that.

The Court: Overruled.

Q. (By Mr. Gerlack): The option is a part of the policy; it is not a rider, is it?

A. No, it is a part of the policy.

Q. It is the usual form that is used; it is on the back of the front page, isn't it? A. Yes.

Q. It is not attached as a rider? A. No.

Q. Mr. Weightman, did you handle the correspondence with Mr. Richardson regarding the policy?

A. I handled some of it and our Home Office handled some of it.

(Testimony of James A. Weightman.)

Q. Did you receive the original of that letter from Mr. Richardson with this attached to it?

Mr. Cohn: May I see them.

Mr. Gerlach: Pardon me. [21]

Q. I assume you received the original of that?

Mr. Cohn: I will stipulate that he received the original.

A. That is right.

Mr. Gerlach: May I offer this in evidence?

Mr. Cohn: Yes.

Mr. Gerlach: It is dated April 10, 1946. 111 Sutter Street. Rm. 930, San Francisco, California.

“The Travelers Insurance Company,
315 Montgomery Street,
San Francisco 4, California.

Attention J. A. Weightman, Assistant Cashier.

Gentlemen:

I acknowledge receipt of your letter of April 4, 1946, regarding my policy No. 373735.

I wish to advise that the policy contract which I hold reads ‘The amount of these options being stated for each \$500 of insurance,’ not ‘for each \$1,000 of insurance,’ as you state in your letter.

Very truly yours,

GEORGE H. RICHARDSON.”

Mr. Cohn: What is the date of that letter?

Mr. Gerlach: April 10, 1946.

Q. You say the first time, as far as you know,

(Testimony of James A. Weightman.)

that somebody discovered this, the plaintiff discovered this, was in March, 1946?

A. Yes. [22]

Q. That was after the company had collected premiums on the original policy and collected the premiums on the present policy?

A. Yes, I believe that is right.

Q. There was nothing further for Mr. Richardson to do to perform his part of the insurance contract except to reach sixty-five years of age?

A. That is my understanding.

Q. He paid all the money and the only thing that was to be performed on Mr. Richardson's part was to live to be sixty-five years of age, which was, I think, August 21, 1946?

A. I don't know about the date.

Mr. Gerlack: I think that is all.

Mr. Cohn: That is all. [23]

Mr. Cohn: I would like to call Mr. Richardson for cross-examination.

GEORGE H. RICHARDSON

the defendant; sworn.

Cross-Examination

By Mr. Cohn:

Q. Mr. Richardson, you are the defendant in this action, are you? A. Yes.

Q. The same George H. Richardson, who is

(Testimony of George H. Richardson.)

named as the insured in the policy which is the subject matter of this litigation; that is correct, is it not? A. Yes.

Q. Mr. Richardson, directing your attention to the year 1926, you were an agent of The Travelers Insurance Company, were you not? A. Yes.

Q. You were an agent authorized to sell life insurance among other forms of insurance, were you not? A. I must have been.

Q. Well, you were, were you not?

A. I had the privilege of delivering contracts of life insurance, I know, so I must have had the privilege of placing them.

Q. You had a signed contract with the company, didn't you?

A. Yes, I had a signed contract.

Q. That was to sell life insurance, was it not?

A. Show me the contract with my signature, and I will say whether I was or not. This is twenty years ago.

Q. Will you take a look at this contract?

A. Yes.

Q. That is the contract that you signed on or about the date it bears, is that right? A. Yes.

Q. To wit July 12, 1926, is that correct?

A. Yes.

Q. That contract authorized you to sell life insurance, did it not? A. Yes.

Q. You resigned from the company December 31, 1927?

A. That is right, December 31, 1927.

(Testimony of George H. Richardson.)

Q. December 31, 1927, that is what it says.

A. Yes.

Mr. Cohn: They are clipped together, your Honor. I will offer them as one exhibit.

Mr. Gerlack: No objection.

The Court: They may be admitted and marked.

(The contract and resignation are marked Plaintiff's Exhibit 4.)

Q. (By Mr. Cohn): You were also licensed by the State of California to sell life insurance in July, 1926, were you not? A. I believe so. [25]

Q. And at or about the time that you applied for this policy of life insurance which is the subject matter of this lawsuit, or, rather, prior to that time, you had, among others, two policies with The Travelers Insurance Company, did you not?

A. I believe so.

Q. And those two policies were encumbered by loans, were they not? A. Apparently.

Q. Well, you know that, don't you, Mr. Richardson?

A. I don't. There were two contracts involved.

Q. I am referring to the two policies, Mr. Richardson, that you surrendered to the company at the time that you got the contract which is the subject matter of this lawsuit?

A. There was a loan on this 37 contract, but whether there was on the other your records would show.

Q. Now, you had been with the company how long at the time that you signed the application,

(Testimony of George H. Richardson.)

Plaintiff's Exhibit 1 in this case, for the contract which is the subject matter of this lawsuit?

A. Your records would show.

Q. Don't you know, Mr. Richardson, how long you had been with the company?

A. How long I had been with the Travelers?

Q. Yes, aside from what the records may show?

A. No. [26]

Q. Haven't you any idea, Mr. Richardson?

A. It is twenty-one years ago and some months.

Q. Now, you were with the Travelers in the capacity of a soliciting agent, isn't that correct?

A. Correct.

Q. And you had recently made your connection with the Travelers? A. Yes.

Q. And business was not so good with you at that time? A. Where? With the Travelers?

Q. Yes?

A. As far as I was concerned the only instruction I received from the Travelers was to solicit accident insurance and the extent of the business would show I was doing pretty good for a new man.

Mr. Cohn: I move to strike that out as not responsive.

Mr. Gerlack: He made a statement in there that he was doing pretty good for a new man.

Q. (By Mr. Cohn): You were having trouble making the premium payments on the two contracts that you ultimately surrendered for this one, were you not? A. I don't believe so.

Q. Do you know a Mr. Whitaker?

(Testimony of George H. Richardson.)

A. Yes.

Q. He was a field assistant with the Travelers at the time we are referring to, was he not?

A. He was in what I would call an official capacity; whether he was field assistant or assistant manager I would be unable to state.

Q. He assisted you in making the transfer, didn't he?

A. That is something I don't know.

Q. You would not say it was not so?

A. I would not, no.

Q. You never discussed the pension form of insurance with whoever assisted you at any time, did you? A. I don't know. [27]

Q. Wasn't this your thought at the time that you applied for the transfer of insurance, to get as much insurance protection as you could, eliminate the loans, at the smallest possible premium?

A. No. I was suggested this coverage. I had \$25,000 worth of protection for my family in the two policies that became the foundation of this one policy which I surrendered for \$10,000 protection.

Q. Now, Mr. Richardson, isn't this a fact, that you had discussed with whoever assisted you in making this change that you were going to surrender these policies that you had? A. No.

Q. You did not do that? A. No.

Q. You did not discuss with them the fact that you were going to surrender the two policies you had and take out a new one—you did not discuss that with anyone? A. I would say no.

(Testimony of George H. Richardson.)

Q. Isn't it a fact, Mr. Richardson, that you discussed with whoever assisted you that you wanted to get all the cash you could out of the two policies that you had and take out a new policy of insurance? A. No.

Q. That isn't true? A. No.

Q. Now, while you were an agent of the Travelers Insurance Company and before you became active in this field you [28] received training in reading the manual Plaintiff's Exhibit 2?

A. No.

Q. From no one?

A. To the best of my knowledge, no.

Q. Without confining you to this particular manual did you ever see any insurance manual of the Travelers Insurance Company like that?

A. No.

Q. Did you ever receive any training whatsoever in the reading of this insurance company manual?

A. No.

Q. No one took you over the ground and showed you how to read it? A. No, they didn't.

Q. Yet you were employed as a life insurance agent under your contract?

A. Agent for the Travelers Insurance Company.

Q. You left the Travelers Insurance Company at the end of 1927, is that right?

A. Your records would indicate that.

Q. That is the date of your resignation there is it not? A. December 31, 1927.

(Testimony of George H. Richardson.)

Q. Did you receive any training in life insurance between July 12, 1926, and December 31, 1927?

A. No. [29]

Q. None whatsoever?

A. Not to the best of my recollection.

Q. Mr. Richardson, subsequent to the time that you left the Travelers Insurance Company, namely, on October 26, or about that date, 1928, you took out another policy with Travelers Insurance Company, did you not? A. Yes.

Q. You were your own agent, that is, I mean you did not do that through any agent at all?

A. I would not recall that at all. Was that a business policy? Who are the beneficiaries?

Q. This is a policy in the amount of \$5,000 payable on your life.

A. That was a personal policy of mine.

Q. You did not have any agent for that? You took that out yourself, isn't that right?

A. I would not recall that.

Mr. Gerlack: That is permissible under the laws of California.

Mr. Cohn: I am not offering it for that purpose.

Q. In 1928 you took out a second \$5000 policy with the company? Is that right?

A. I would not recall.

Q. On December 15, 1931, you took out a \$2000 policy with the company, didn't you?

A. No. [30]

Q. That is not so? A. No.

(Testimony of George H. Richardson.)

Q. On the same date, December 15, 1931, you didn't take out a \$2,000 policy with the company?

A. No.

Q. That isn't so? A. It is not so.

Q. Without referring to specific dates, but within a very short time after you left the Travelers Insurance Company you took out a number of policies with the Travelers Insurance Company yourself, did you not, on your life?

A. I don't know what you mean by a number, but I have always been a great believer in life insurance.

Q. When I say "a number" I mean two or three or four insurance policies? Didn't you take out a number with the Travelers Insurance Company?

A. Your records would indicate.

Q. Don't you know, Mr. Richardson? You had the policies, you know that, don't you?

A. No.

Q. You don't know that? A. No.

Q. You recognize that you could have not have taken out insurance that you did not know anything about? A. I know I paid premiums. [31]

The Court: You took out a policy in 1926. What is your recollection as to policies you took out later with the Travelers Insurance Company?

A. I know there were two on my life and I think there was a business policy taken out.

Q. (By Mr. Cohn): Now on all of those policies you acted as your own agent, isn't that so?

A. I don't know.

(Testimony of George H. Richardson.)

Q. You mean to tell me that you took out insurance policies and you don't know who the agent was that wrote them?

A. Your records would show that.

The Court: Counsel is asking for your recollection.

A. I answered him, I don't know.

Q. (By Mr. Cohn): Let me ask you this question: isn't it a fact that you have taken out a number of policies at or about the time you severed your connection with the Travelers Insurance Company in which you did act as your agent?

A. I don't know.

Q. Do you mean to tell me, Mr. Richardson, that you don't know that, and that is your answer to that question? A. Yes.

Mr. Cohn: I think that is all at this time.

Mr. Gerlack: That is all at this time. We will put our case on. [32]

GERALD WHITAKER

called for the Plaintiff; sworn.

The Clerk: Will you state your name to the court.

A. Gerald Whitaker.

Q. (By Mr. Cohn): Where do you live, Mr. Whitaker?

A. I live at 800 Contra Costa Avenue in Berkeley.

(Testimony of Gerald Whitaker.)

Q. What is your business?

A. I am manager of the Travelers Insurance Company's Oakland branch office.

Q. Were you also connected with the Travelers Insurance Company in November, 1926?

A. Yes.

Q. Where were you located at that time?

A. I was in the San Francisco branch office as a field assistant in the agency department.

Q. At or just prior thereto did you make the acquaintance of Mr. Richardson, the defendant in this lawsuit? A. Yes.

Q. What was his business at that time?

A. At that time Mr. Richardson was an agent of the Travelers Insurance Company in the San Francisco branch office.

Q. Were you the person who assisted him in changing over his policy? A. I was.

Q. Did you know that he was already insured with the Travelers Insurance Company? [33]

A. Yes.

Q. How did you know that?

A. He showed me his Travelers' policies which had been taken out in another branch office.

Q. Do you know what his condition was as far as making payment of premium on these policies? Did he discuss that with you?

A. Yes. He had two policies, one about ten years old and the other about eight; one was for \$15,000 and the other was for \$10,000; and there were loans on both policies, and being somewhat of

(Testimony of Gerald Whitaker.)

a new agent with the Travelers and his income not being much as yet, he wanted to change the policies so that he would have a lesser premium and either lessen the loan or have the loan wiped out entirely.

Q. Did he discuss the possibility that he might give the policies up altogether?

A. He did.

Q. What did he say in that regard, as near as you can recall?

A. He at first planned to take the equity, and by "equity" I mean present cash value left after the existing loan and apply it to a new policy at his then age in 1926, and I suggested that we communicate with our home office to see if we could change the policy and protect his original age so that he would have the amount of insurance that he desired, which was \$10,000 and have the benefit of the rate in force when he was ten years younger. [34]

Q. Now what form of policy did you discuss? Did you discuss annuity, pension or what?

A. We discussed what we call our insurance annuity maturing at the age of sixty-five.

Q. Was that the type of policy that you suggested to him? A. Yes.

Q. How did that come about, do you recall?

A. I don't recall exactly but it probably came out after discussing the many types of contract that we had, and decided on a policy that the premium would be within his means at that time.

(Testimony of Gerald Whitaker.)

Q. You conducted the negotiations with the home office on that? A. I did.

Q. I will ask you, Mr. Whitaker, did you write to the home office on this matter? A. I did.

Q. What information did you give them?

A. I advised them of Mr. Richardson's condition; I advised them that he was an agent, that he had \$25,000 life insurance with the Travelers, that he desired a \$10,000 policy on the annuity plan and asked them to prepare figures for us whether or not it was more advantageous to take the rate in 1916 or the 1926 rate.

Q. Did they subsequently communicate with you?

A. They did; they mailed to me the figures showing the premium [35] for the \$10,000 policy, how the loan would be reduced from the amount on the \$25,000 to the amount on the \$10,000.

Q. Are these the figures that you received?

A. Yes.

Q. This is a duplicate, is it not?

A. Yes—that is a carbon copy.

Q. It is a carbon copy of what they sent you?

A. Yes.

Q. You showed that to Mr. Richardson just as it is?

A. Yes. I showed it to him and talked it over with him.

Mr. Cohn: I will offer this in evidence, your Honor.

The Court: It will be received.

(Testimony of Gerald Whitaker.)

(The memorandum is marked Plaintiff's Exhibit 5.)

Q. (By Mr. Cohn): I notice that it says "Annual premium 335.60" on the proposed new contract? A. Yes.

Q. That is broken down. So that the court will be clear on this the \$48.10 is for what?

A. For a disability provision that provides for waiver of premium and income of \$100 a month.

Q. Then the balance of the premium is on what?

A. On the annuity insurance at the age of 65.

Q. The total is \$335.60?

A. The total is \$335.60.

Q. Did Mr. Richardson agree that was the form of insurance that he wanted with you?

A. He did. [36]

Q. And authorized you to procure it?

A. Yes.

Q. I show you Plaintiff's Exhibit 1; did you prepare that? A. I did.

Q. And had Mr. Richardson sign it?

A. Yes.

Q. Now, in November, 1926, were you connected with the agency department of the Travelers?

A. Yes.

Q. Did you have anything to do with the training of new agents? A. I did.

Q. Will you state what training, if any, was given to agents in life insurance?

A. They were trained in what we call manual

(Testimony of Gerald Whitaker.)

drill; that is, so they would be familiar with the rate manual, the premium rate; they were also trained in sales talk or sales ideas.

Q. Were the various forms of contracts issued by the company at that time the subject matter of any training? A. Yes.

Q. Were they explained to the life insurance agents? A. They were.

Mr. Cohn: You may cross-examine.

Cross-Examination

By Mr. Gerlack:

Q. How many insurance policies have you had personal contact and experience with in the last twenty-one [37] years since this conversation with Mr. Richardson? A. Many.

Q. Do you recall all the details of each and every one of the different transactions as vividly as you have detailed the conversation with Mr. Richardson? A. No.

Q. As a matter of fact you never personally explained his duties there, did you?

A. I believe that I assisted Mr. Richardson as an agent as I did many other agents in the San Francisco branch office.

Q. Regardless of what the contract says he was employed for the purpose of soliciting accident insurance solely, was it not?

A. No, sir. He was employed to represent us in our life insurance department as well as the accident department.

(Testimony of Gerald Whitaker.)

Q. While it was possible for him to write policies in the life department, and he was privileged under his license from the State of California to write life insurance, his duties ostensibly called on him for writing accident insurance, isn't that correct?

A. Yes, but they are licensed to write for all departments.

Q. Now getting back to the time that this policy was issued, the total premium on the \$15,000 policy was \$309.75, isn't that correct?

A. I would have to look at the letter which shows the amount of premium. [38]

Q. He was paying for \$15,000 of insurance under the policy which was converted \$309.75, is that correct? A. Yes.

Q. That included \$48.10 for total permanent disability?

A. No. Permanent total disability was already on it; when he made the change it was on the other contract. There were two policies.

Q. Do you know where the original contract is?

Mr. Cohn: I have it here, if you want it.

Q. (By Mr. Gerlack): As to the \$309.75, which was the \$15,000 policy, the rate he was paying on that was \$0.35 a thousand, was it not?

A. \$20.65.

Q. \$20.35 is pretty close. Now the premium on the present policy was \$287.50; the premium on that was \$28.75 per thousand, is that correct?

A. The annual premium would be that.

(Testimony of Gerald Whitaker.)

Q. Therefore, under the present policy the premium rate was more than \$8.00 more per thousand than the premium rate on the \$15,000 policy, which was \$20.65? A. Yes.

Q. Per annum? A. Yes.

Q. When did the transactions you have told us about with a great [39] deal of detail, when you discussed the transfer matter with Mr. Richardson—when did that take place?

A. After reviewing the file so my memory would be refreshed, I would say it was at the time that this change was made.

Q. You have no specific independent recollection of that?

A. No. It is only after a review of our files.

Q. Are you basing that conversation you had on these records or are you relying on independent recollection that you had irrespective of the records?

A. No; I am basing it on our records after reviewing the file.

Q. You presume from what the records show you must have had this conversation?

A. I reviewed the letter that I wrote the home office asking their recommendation on this matter, their reply to me, and subsequent letters, along with the contract.

Q. If it was not for the records you would not remember? A. No.

Mr. Gerlack: I think that is all.

Mr. Cohn: That is all. Plaintiff rests.

The Court: We will take a recess until two o'clock. [40]

Afternoon Session

GEORGE H. RICHARDSON

recalled for defendant.

By Mr. Gerlack:

Q. Mr. Richardson, you have previously been sworn? A. Yes.

Q. Just to clear up your connection with the Travelers Insurance Company, when did you come to San Francisco? A. 1922.

Q. What was your occupation from then on to 1926?

A. I was manager of Naumberg & Company's office in San Francisco—they are a New York Company.

Q. What was their business?

A. Commercial paper and notes.

Q. Pretty much the same business as you are in now?

A. It was a business in which commercial paper and notes were sold.

Q. Any way you were in——

A. Financial business.

Q. How did you come to go with the Travelers Insurance Company?

A. Naumberg & Company closed their Pacific Coast office, and having been in California for four years I did not want to go back East.

Q. Then an opportunity presented itself with the Travelers? A. Yes. [41]

Q. And you went with them? A. Yes.

(Testimony of George H. Richardson.)

Q. At the time you signed that contract with the Travelers is that the usual type of contract with agents?

A. I took it for granted that it was.

Q. The same type? A. Yes.

Q. That gave you a right to sell and get a commission on all policies issued by the Travelers, did it? A. Yes.

Q. What kind of business did Travelers have you solicit and do?

Mr. Cohn: I object to that since there is no proper foundation laid for it.

The Court: That is too general.

Q. (By Mr. Gerlack): You went with the Travelers in what department? What type of insurance did you solicit for them?

A. They put me at selling accident insurance.

Q. Did you actually sell life insurance?

A. I took what they told me to do; I was working for them.

Q. Originally did you ask to sell life insurance for them? A. Yes.

Q. When they asked you to sell accident insurance did they give you any reason why they did not permit you to sell life insurance?

A. I was strictly on a commission basis and it was evidently [42] their thought that accident commissions would help a man to live. I was strictly on commission.

Q. How much commission did you get on the accident policies? A. Twenty-five per cent.

(Testimony of George H. Richardson.)

Q. Did you have any drawing account?

A. No.

Q. You sold policies and got twenty-five per cent commission and that is all? A. Yes.

Q. Did they give you any rate manual or anything to carry with you?

A. I am sure I had an accident manual.

Q. How many types of accident policies did you sell? A. Two particularly.

Q. Was it necessary to look in the manual to find a man's age or anything of that character in connection with these policies? A. No, sir.

Q. Was there a flat premium or did the premiums vary on the policies?

A. I would call it a flat premium; that is, they paid \$25 a week disability or \$5,000 in case of accidental death; that was \$25 premium.

Q. Did the amount of the premium depend on the age? A. No. [43]

Q. Just a flat rate policy? A. Yes.

Q. It covered practically all injuries?

A. When a man reaches sixty the premium goes up.

Q. But the ordinary man you solicited you did not have to look up what the premium was?

A. No.

Q. For that reason it was not necessary to have that manual, is that correct? A. Yes.

Q. When you went there did they give you any training or any schooling to learn the accident insurance business?

(Testimony of George H. Richardson.)

A. They had I think what you would call on-the-job training; that is, one of the assistant managers would go out with you.

The Court: Counsel's question was, did they give you any training when you first went to work for them?

A. No.

Q. (By Mr. Gerlack): You did not go to school for a period of time to learn the business?

A. No.

Q. Did they give you any literature or anything like that? A. Yes.

Q. What were those?

A. Well, just folders describing the two types of accident policies.

Q. It had nothing to do with life insurance?

A. No.

Q. You said you had job training; what did you mean by that?

A. Well, as I said, one of the assistant managers would go out with you and make calls with you.

Q. Was that Mr. Whitaker?

A. No. There were two men, you might say, my bosses.

Q. Who were they?

A. Mr. Clendenan and Mr. Hensley.

Q. Do you know where Mr. Clendenan is now?

A. No.

Q. Have you seen them from that time to this?

A. I have seen Mr. Hensley from time to time,

(Testimony of George H. Richardson.)

but I have not seen him in a number of years. He is I believe down on the Peninsula and you tried to get in touch with him.

Q. You attempted to get in touch with him?

A. You tried to.

The Court: Answer the question.

Q. (By Mr. Gerlack): You attempted to get in touch with him? A. Yes.

Q. Now did you know of your own knowledge at the time you were with the Travelers Insurance Company what was their practice in regard to training so far as soliciting is concerned?

A. To train them as they trained me.

Q. That did not include any instruction in how to use the life rate manual? [45] A. No.

Q. Now, how did you get along as an agent for the company soliciting this accident insurance after you went to work in July, 1926?

A. Fairly well.

Q. When did you cease your duties actively as an agent?

A. The early part of 1927 you might say I set up my own business along the line of what I had been in previously.

Q. How long had you been in this previous business with Naumberg & Company?

A. I was with them from 1904 practically the entire time to 1926 when they closed their office here.

Q. In 1926? A. Yes, 1926.

Q. The business you are now engaged in is the business you started in the spring of 1927?

(Testimony of George H. Richardson.)

A. Yes.

Q. Therefore you were in a dual capacity during the year 1927, I understand, of being on the rolls of the company as an accident soliciting agent of the company and carrying on your own business?

A. That is correct, except that I was giving practically all my time to my own business.

Q. Do you recall how you came to formally resign on December 31, 1927? [46]

A. Well, I think I felt that I should give all of my attention to my own business, and divorce myself from the insurance business.

Q. Why did you give up the insurance business?

A. Well, I am afraid I was not the type that makes a real success of the insurance business.

Q. Did you feel that you were not suited to be in the insurance business? A. Yes.

Q. You recall the loans that have been testified to here? A. Yes.

Q. Do you recall whether the company had the policies or whether they had been returned to you?

A. I would not be able to state on that. I know they had them but when they came back to me I don't recall.

Q. You do recall that the policies went back to the company?

A. Absolutely; it was the practice for the policies to go back to obtain a loan on the policies.

Q. Now, Mr. Richardson, do you recall the circumstances under which you changed these poli-

(Testimony of George H. Richardson.)

cies, the \$25,000 worth of insurance and took this policy of \$10,000 with the special option?

A. My recollection is——

Q. Just tell his Honor how this all happened, how it came about? [47]

A. My recollection is that I discussed it with some of the men down at Travelers and I was told that there was a policy that they felt might fit in as well with my requirements and I would cease paying premiums at the age of 65, and that there were options in that policy by which if I lived to 65 I would receive practically the same benefits as I would receive from the life policies which were replaced by this present policy.

Q. What were these policies, what were the types of them?

A. \$10,000 ordinary life and \$15,000 cash settlement at the age of 80.

Q. That is \$15,000 at the age of 80?

A. Yes. Those two policies that I replaced represented \$25,000.

Q. Do I understand you to say then that the understanding that you came to with the Travelers Insurance Company in the fall of 1926 was that you could get this present policy which would afford you \$10,000 and have the benefits and options that you would with the \$25,000 policies? A. Yes.

Q. Was that the definite understanding with the officers of the Travelers?

Mr. Cohn: Your Honor, I would like to make an objection to that question on the ground there

(Testimony of George H. Richardson.)

is no proper foundation laid for it and it calls for a conclusion.

The Court: It calls for an opinion and conclusion.

Q. (By Mr. Gerlack): What was the position with the Travelers of both Mr. Glendenin and Mr. Hensley? [48]

A. I would say that they were assistant managers.

Q. In what department?

A. Well, they specialized on life insurance so far as my understanding was.

Q. What advice did they give you insofar as changing or dropping the \$25,000 policies and taking the \$10,000?

A. Well, that I would benefit myself by the fact that the premium ceased at the age of 65, when the policy matured, and that so far as I was concerned that after 65, if I lived, that I would receive practically the same amount as I would on the other policies.

Q. In other words that was a definite understanding from your discussion with Mr. Clendenin and Mr. Hensley? A. Yes.

Q. What was done after that, after you had this discussion? You showed them your present policies, did you?

A. I would not be able to recall on that; they had that data on the policies in their file; whether I had the policies or not I don't know.

(Testimony of George H. Richardson.)

Q. At that time the policies were in the company's files? A. Yes.

Q. Did you come to a definite understanding with them concerning the type of new policy you were to get?

A. Well, I took the policy that had been suggested to me as the equivalent of what it replaced.

Q. (By The Court): What do you mean by the term "equivalent." It took \$25,000 to get \$10,000; that was not equivalent. What do you mean by "equivalent"?

A. Well, that the option was such on that policy, the \$10,000 policy, that if I lived to be 65, that sofar as I was concerned I would receive under the option the same benefits as I could have received under the \$25,000.

Q. (By Mr. Gerlack): That was their representation to you at the time?

A. That was my understanding.

Q. Now what happened after you reached that understanding?

A. Well, I signed an application.

Q. Who worked out the mechanics of that?

A. Mr. Whitaker testified he did and I have no question but that his statement is correct.

Q. Do you recall talking to him personally about it? A. I don't until outside this morning.

Q. But the understanding you had was with Mr. Clendenin and Mr. Hensley? A. Yes.

Q. Now, the complaint alleges in paragraph 4 "that by mutual mistake said policy of insurance

(Testimony of George H. Richardson.)

so issued to defendant was not the policy of insurance applied for by defendant, nor the policy intended to be issued by plaintiff." Was there any mistake, so far as you were personally concerned in your [50] understanding of the type of policy you would get?

Mr. Cohn: I object to that question on the ground it calls for a conclusion.

The Court: It calls for a conclusion. Let him give the conversation.

Q. (By Mr. Gerlack): You examined the policy which is the basis of this lawsuit?

A. Yes.

Q. Was it your understanding that that was the type of policy you were to get when you had this conversation with Mr. Clendenin and Mr. Hensley?

A. Yes.

Q. And was it your understanding that that policy you got, and on which you paid twenty premiums—was it your understanding that you would take that type of policy and pay the premiums on, when you had this understanding with Mr. Clendenin and Mr. Hensley?

Mr. Cohn: I object to the understanding the witness says he had with those two gentlemen. How does he know that they were assistant managers.

Q. (By Mr. Gerlack): Do you know their positions?

A. I would not be able to state their titles but I think there is a gentleman here who could testify exactly to what they were.

(Testimony of George H. Richardson.)

Q. At any rate, whatever representations they made to you [51] they made on behalf of the Travelers Insurance Company, is that right?

A. Yes, the representation made to me was that I was making a change advantageous to myself in that I was through paying the premiums at age 65 on that policy——

Q. (By the Court): You received this policy, did you? A. Yes.

Q. I assume you looked it over at the time you received it, did you not?

A. In a very cursory way.

Q. Was there anything in the cursory examination of that policy that called your attention to the fact that there was any difference between that policy and the others that you had?

A. Absolutely not.

Q. Or the application that you signed?

A. Absolutely not.

Q. (By Mr. Gerlack): I notice that counsel made a great point that this application says "Amount \$10,000 insurance annuity age 65 on the Uniform Premium Plan with No. A Disability Provision." Did you discuss or was that drawn to your attention, or was anything said about that technical term "Insurance annuity age 65" at the time you had the discussion with Mr. Clendenin and Mr. Hensley or with Mr. Whitaker?

A. My recollection would be that at the age of 65 they called to my attention the fact that I could take an income of \$1,000 [52] a year or surrender

(Testimony of George H. Richardson.)

the policy for whatever value the policy gave me which he stated to me was available but I had to reach the age of 65.

Mr. Gerlack: I think that is all.

Cross-Examination

By Mr. Cohn:

Q. Mr. Richardson, when you were questioned by the court you said that you read this policy when you got it?

A. If I so said I wish to apologize for my statement.

Q. How long after you got your policy did you read it? A. I did not read my policy.

Q. If I misunderstood you I want you to correct me: I understood you in reply to the question by the court to say when the policy was delivered to you you looked it over cursorily?

A. I looked it over cursorily, but by reading it I take it you mean as you would read a book.

Q. Let me ask you this, you recall your deposition being taken in this case? A. Yes.

Q. Would you read page 11 line 22?

A. "Mr. Cohn: Q."**——

Q. Read it to yourself?

A. I beg your pardon. Yes.

Q. I will ask you if on October 14, 1946, this question was asked you to which you gave this answer: "Can you give us any idea of approximately how long ago it was that you read this policy of insurance for the first time, Mr. Richardson?

A. No sir."

A. Yes.

(Testimony of George H. Richardson.)

Q. And the following question "In other words, it may have been one month ago or it may have been twenty years ago, is that correct? A. I didn't read it twenty years ago."

Q. You gave those answers to those questions at that time, is that correct? A. That is correct.

Q. Now Mr. Richardson, you said that you began in business with this company,—I did not quite catch the name?

A. Naumberg & Company.

Q. That was in 1904, was it? A. 1904.

Q. Part of the business of that company was making loans on policies of insurance, wasn't it?

A. Yes.

Q. That is the same business you are in today?

A. It is part of the business I am in.

Q. Part of your business is negotiating loans on life insurance policies is it not?

A. That is correct.

Q. For clients of yours?

A. That is correct.

Q. And that was the business you were in in 1927, was it not? A. It was not. [54]

Q. What did you mean when you said you were in the same business today as you were with Naumberg & Company?

A. I did not say the same; I said similar.

Q. When did you first start negotiating loans on life insurance policies? A. In 1929.

Q. That was the first time? A. Yes.

(Testimony of George H. Richardson.)

Q. Now in 1929 you were familiar with life insurance business, were you?

A. As a policy holder, yes.

Q. Well, you were a licensed agent, weren't you?

A. Yes, it would appear so.

Q. To sell life insurance? A. Yes.

Q. And you said that is what you wanted to do when you went with the Travelers? A. Yes.

Q. And they would not let you? A. Yes.

Q. Did you have any specific hours of employment? A. No.

Q. You could come and go and work at other things, is that right?

A. As far as hours of employment are concerned my hours of employment have always been to be at the office at starting [55] time in the morning and leave at a certain time at night.

Q. (By The Court): You had no specific hours of employment? A. No.

Q. (By Mr. Cohn): As far as accident insurance was concerned they did not give you leads, but you could go to anybody? A. Yes.

Q. You could submit applications to the company from any one? A. Yes.

Q. So that when you told this court they would not let you write life insurance that was strictly up to you as to what to do?

A. My reply to that would be that my training has been to do what my instructors tell me to do.

Q. They didn't tell you to do anything, did they?

A. Yes.

(Testimony of George H. Richardson.)

Q. Did somebody tell you what to do?

A. Yes.

Q. Who?

A. I was turned over to Mr. Hensley and Mr. Clendenin to be my instructors and I did as my instructors told me.

Q. There was no instruction as to the method that you should use? A. No.

Q. In other words they told you what you could sell and what you could not sell, is that right? [56]

A. They suggested it to me in the instructions.

Q. Didn't they also give you some training as to what these various policies were?

A. Not that I can recall.

Q. Will you read on page 13 line 3?

A. Yes.

Q. I will ask you if when your deposition was taken this question was asked you, to which you gave this answer:

“Q. Now, Mr. Richardson, when you went to work for the Travelers Insurance Company as a contract agent, you were given some training before you were sent out into the field, isn't that correct?

A. Correct.” Didn't you so testify?

A. Is the length of time stated there?

Mr. Gerlack: I think the proper question is to ask the witness if he made the statement and give him an opportunity to explain.

Mr. Cohn: I was going to do it but he did not give me a chance.

(Testimony of George H. Richardson.)

A. My testimony I think fully agrees with my deposition.

Q. Just let me read this into the record.

“Q. Now, Mr. Richardson, when you went to work for the Travelers Insurance Company as a contract agent, you were given some training before you were sent out into the field, isn’t that correct? A. Correct.

“Q. And who gave you that training, do you know?

“A. Chris Hensley, Norman Clendenin.

“Q. Of what did your training consist, Mr. Richardson? A. Accident insurance.

“Q. Did they explain anything about policies of life insurance to you? A. Yes.”

Now did you give that testimony at the time of the taking of your deposition? A. Correct.

Q. Regardless of whether that training was in the field in the life insurance or accident insurance you were given training before you were sent into the field, isn’t that so?

A. Training occupying a brief six hours.

Q. Maybe we do not understand each other?

A. No, I do not.

Q. You can answer this question yes or no, can’t you? Regardless of what you testified to in your deposition is it not a fact that policies of insurance, whether accident or life or whatever the case might be were shown to you and explained to you?

A. As to accident insurance.

(Testimony of George H. Richardson.)

Q. Did they send you any literature for you to read? A. I would not recall.

Q. Do I understand your testimony as you sit there, and correct me if I am wrong, that you did not get any training as far as life insurance was concerned,—nobody explained the policy to you?

A. That is correct.

Q. But at the same time you were a licensed agent to sell life insurance? A. Yes.

Mr. Cohn: That is all.

Mr. Gerlack: That is all. That is our case.

The Court: Is there any rebuttal?

Mr. Cohn: I would like to recall Mr. Whitaker for a question.

GERALD WHITAKER

recalled for Plaintiff.

By Mr. Cohn:

Q. Mr. Whitaker, did you receive any commission or any compensation at any time for assisting Mr. Richardson in changing over his policies?

A. No.

Cross-Examination

By Mr. Gerlack:

Q. What commission does the company pay on life insurance?

A. If the contract is less than \$2500 it is fifty per cent commission; if the contract is \$2500 or more the commission first year is 55 per cent; the

(Testimony of Gearld Whitaker.)

renewal commission may be five per cent for four years or five per cent for nine years or three per cent for nine years, depending on the type of contract.

Q. Mr. Whitaker, did you know Mr. Clendenin?

A. Yes. [59]

Q. And Mr. Hensley? A. Yes.

Q. During the year 1926 what was their connection and title with the company?

A. Mr. Clendenin was assistant manager in charge of the life, accident and annuity department in the San Francisco branch office.

Q. And Mr. Hensley?

A. Mr. Hensley was a field assistant in the same department.

Redirect Examination

By Mr. Cohn:

Q. Do you know where either of those men are now?

A. No. Mr. Clendenin was retired on permanent and total disability a number of years ago, about 15 years back. Mr. Hensley left the Travelers ten or twelve years ago. I don't know what his connection is now.

Mr. Cohn: That is all.

Mr. Gerlack: That is all.

Mr. Cohn: That is the plaintiff's case.

Mr. Gerlack: That is the defendant's case.

CERTIFICATE OF REPORTER

I, Edward W. Lehner, Official Reporter, certify that the foregoing . . . pages is a true and correct transcript of all matter therein contained as reported to me and thereafter reduced to typewriting.

/s/ EDWARD W. LEHNER. [60]

[Endorsed]: No. 11917. United States Circuit Court of Appeals for the Ninth Circuit. George H. Richardson, Appellant, vs. The Travelers Insurance Company, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed April 30, 1948.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the Circuit Court of Appeals for the
Ninth Circuit

No. 11917

GEORGE H. RICHARDSON,

Appellant,

vs.

THE TRAVELERS INSURANCE COMPANY,

Appellee.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL AND DESIGNATION OF PARTS OF RECORD APPELLANT THINKS NECESSARY FOR CONSIDERATION THEREOF (RULE 19, SUBD. 6-CCA-9TH)

Pursuant to the above rule, appellant states the following points on which he intends to rely on appeal, as follows:

1—The said District Court erred in finding that the appellee was not guilty of laches in instituting this present action in 1946 when it had the clear opportunity, in 1926 when it issued the policy, and again in 1928, again in 1931, again in 1933 and again in 1936 when it had the policy in its hands at its San Francisco branch and home offices, on each of these occasions in connection with policy loans, to discover the now claimed error in the issuance of the policy, and knew, or by the exercise of ordinary diligence, would have known of such error if any, but nevertheless waited some 19 years, after the issuance of the policy, and after appellant had

paid to appellee all of the 20 annual premiums called for under the policy, before instituting this present action to now reform the policy.

2—The District Court erred in finding and concluding that the California Statute of Limitations, Code of Civil Procedure, Sections 312 and 338, did not apply to the instant action.

3—That the District Court erred in finding that the “incontestable clause” of the policy did not apply to the present suit in the instant case.

4—The District Court erred in finding that the appellee only discovered for the first time the claimed error in the policy in 1946. In view of the District Court’s findings XVI that the appellee had the policy in his possession four times, namely July and August, 1928; September and October, 1931; October and November, 1933, and June, 1936, the said District Court’s findings are inconsistent and contradictory in the following respects, to wit:

Finding XVI finds the appellee had the insurance policy in question in its possession in its San Francisco branch and also in its Home Office in Hartford, Connecticut, in connection with policy loans four different times, namely, 1928, 1931, 1933 and 1936, whereas finding XVI also finds that the appellee discovered the claimed mistake in the issuance of the policy for the first time in March, 1946, and the said District Court erred in rendering judgment for the appellee based upon such inconsistent and contradictory findings.

5—The District Court erred in ordering judgment for the appellee in view of the appellee’s ad-

mitted examination of the policy in question in July and August, 1928; September and October, 1931; October and November, 1933, and June, 1936, and the Trial Court's finding XVI to that effect, and what appellant claims is a clear, unmistakable and inexcusable case of laches on the part of the appellee.

6—The District Court erred in finding that the appellant was not prejudiced by the appellee waiting 19 years and collecting all of the 20 annual premiums due under the policy and further waiting until the appellant was almost 65 years of age and obviously uninsurable before bringing the present action.

7—The District Court erred in finding that the policy of insurance was issued through mutual mistake of parties hereto and/or that the policy was issued by mistake of appellee which appellant at the time knew or suspected, and also in finding that the policy as issued was not the policy applied for by the appellant, and in finding that the special privileges inserted in the policy by the appellee was by mutual mistake of the parties and/or by mistake of the appellee which appellant at the time knew or suspected.

And also pursuant to said rule above mentioned, appellant hereby designates the following parts of the record he thinks necessary for consideration thereof, namely:

1—The complaint of Plaintiff but with the exhibits (photostatic copies thereof) printed or bound in 10 copies only of the printed record.

2—The answer and counterclaim of the Defendant, but with exhibits (photostatic copies thereof) printed or bound in 10 copies only of the printed record.

3—The answer of Plaintiff to Defendant's counterclaim.

4—The findings of fact and conclusions of law made by the court.

5—Judgment of the Trial Court.

6—Notice of Appeal.

7—Designation of Contents of Record on Appeal.

8—Statements of points on which Appellant intends to rely on appeal.

9—This Statement of Points on which Appellant intends to rely on appeal and designation of parts of the record Appellant thinks necessary for consideration thereof.

Dated: May 4, 1948.

/s/ ALVIN GERLACK,

Attorney for Appellant.

Receipt of a copy of the within Statement is hereby admitted this 4th day of May, 1948.

/s/ JOSEPH T. O'CONNOR,

/s/ HAROLD H. COHN,

Attorneys for Appellee.

[Endorsed]: Filed May 4, 1948.

